TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 388.

N. O. MURPHY, C. H. AKERS, AND J. W. VICKERS; AND N. O. MURPHY, GOVERNOR; C. H. AKERS, SECRETARY, AND J. W. VICKERS, AUDITOR, OF THE TERRITORY OF ARIZONA, CONSTITUTING THE BOARD OF COMMISSIONERS, STYLED THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, APPELLANTS,

vs.

JAMES L. UTTER AND GEORGE ALBRIGHT, WESLEY ALBRIGHT, AND WILLIAM H. McGINNIS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ELIZABETH B. VOORHIES, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED JULY 29, 1901.

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1 In the Supreme Court in and for the Territory of Arizona.

JAMES L. UTTER and ELIZABETH B. VOORHIES, Plaintiffs,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. BRUCE, Loan Commissioners of the Territory of Arizona, Defendants.

The plaintiffs petition the court and allege:—

That plaintiff James L. Utter resides at Oak Hill in the State of New York, and Elizabeth B. Voorhies resides in the city of New York in said State; and that defendants reside in the city of Phœnix, Arizona Territory and that they constitute and compose the loan commissioners of the Territory of Arizona, and are acting as such.

II.

That plaintiffs allege, that by virtue of the authority of the act of the Legislative Assembly of the Territory of Arizona, entitled "An act to promote the construction of a certain railroad" approved February 21st, 1883, the County of Pima in said Territory did on the first day of July, A. D. 1883, issue its bonds, each for the sum of one thousand dollars, to the number of one hundred and fifty, and which said bonds are numbered consecutively 1 to 150
2 inclusive, and all of said bonds are in the same words and figures, of which the following is a copy, to wit:—

"One thousand dollars. UNITED STATES OF AMERICA, *Territory of Arizona, County of Pima.* One thousand dollars.

"The County of Pima in the Territory of Arizona, for value received promises to pay to the Arizona Narrow Guage Railroad Company, or bearer, at the office of the treasurer of said county, in the city of Tucson, on the first day of July A. D. one thousand nine hundred and three, the sum of one thousand dollars in lawful money of the United States, with interest thereon at the rate of seven per cent. per annum, said interest payable at the office of the treasurer of Pima county, semi-annually, on the first day of January and the first day of July in each year, on presentation and surrender of the interest coupons hereto attached.

"This bond is issued by the board of supervisors of said county of Pima, under and by virtue of an act of the legislature of Arizona entitled 'An act to promote the construction of a certain railroad' approved by the governor thereof the 21st day of February A. D. 1883, and this bond is one of a series of two hundred issued in pursuance of said act and exchanged for a like number of bonds of said railroad company of like amounts, bearing like interest, and running like time as the bonds of which this is one.

"In testimony whereof, the said county by its board of supervisors has caused this bond and the coupons hereto attached, to be signed by the chairman of the board of supervisors, and countersigned by the clerk of said board, and by the county recorder of the said Pima

county, and the said clerk has affixed hereto the seal of said county, and the said recorder has affixed hereto the seal of said county recorder's office this first day of July A. D. 1883.

"JAMES H. TOOLE,
" *Chairman Board Supervisors.*
"CHAS. R. DRAKE,
" *County Recorder.* [SEAL.]
"WILLIAM J. ORBORN,
" *Clerk Board of Supervisors.* [SEAL.]"

And to each of said bonds were attached forty coupons numbered consecutively 1 to 40 inclusive, each for the sum of thirty-five dollars, and the first one became due January 1st, 1884
3 and the next one six months thereafter, and so on, one became due on the first day of January, and one the first day of July in each successive year, the last one on the first day of July A. D. 1903, and delivered the same with the coupons attached to the Arizona Narrow Guage Railroad Company as is provided for in said act, in exchange for a like number and denomination of bonds of that company with like coupons thereto attached.

And plaintiffs allege that the said railroad company, then the owner of said bonds sold the same in open market for a good and valuable consideration, and after divers sales and deliveries the plaintiffs for good and valuable consideration then and there paid, purchased the said bonds and all the coupons thereof, except the first seven, in open market, and the same were delivered to the plaintiffs who are now the owners of the same.

Plaintiffs allege that none of said bonds or the coupons attached thereto (except the first seven) have been paid, and the amount of the principal of each bond and matured coupons thereof, owned by plaintiffs July 1st, 1896, was $1,665.00 and on January 1st, 1897, the sum of $1,700.00. So that the total of principal and matured coupons July 1st, 1896 was $249,750.00 and on January 1st, 1897 is $255,000.00.

Plaintiffs allege that each of said coupons bear interest at
4 the rate of seven per cent. per annum from the date of maturity, aggregating an amount up to July 1st, 1896 of $34,964.50 and all aggregating, that is to say, principal, coupons and interest on coupons, on January 1st, 1897 the sum of $289,964.50.

Plaintiffs allege that by law it is the duty of defendants to provide for the redeeming and refunding of the said county indebtedness, and to issue bonds for said indebtedness in redemption of the said bonds, coupons and interest as aforesaid; and on the 12th day of December A. D. 1896 the plaintiffs made demand on the defendants that the defendants as loan commissioners of the Territory of Arizona issue bonds as provided by law in exchange for said bonds, coupons and interest as aforesaid. Which said demand was made in writing by serving on the defendants and causing to be filed with the clerk of said commission a paper in writing, a copy of which is herewith filed and made a part hereof and marked "Exhibit A."

And the plaintiffs allege that the defendants have failed and re-

fused hitherto to comply with said request and demand and hitherto and now refuse so to do. That plaintiffs have not a plain, speedy and adequate remedy in the ordinary *cause* of law.

Plaintiffs therefore pray that there issue out of this court an alternative writ of mandamus directing and requiring the de-
5 fendants acting as the loan commissioners of the Territory of Arizona to issue bonds in exchange for said indebtedness or show cause before said court why the peremptory writ of mandamus shall not issue commanding them to perform their said duty, and they pray for such other and further relief as the law may give them.

By BARNES & MARTIN,
Attorneys for Plaintiffs.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

W. H. Barnes being first duly sworn on oath states that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true in substance and in fact. He also states that he is the authorized agent of the plaintiffs in this behalf, and makes this affidavit for them.

W. H. BARNES.

Subscribed and sworn to before me this 24th day of December A. D. 1896.

JOHN H. MARTIN,
[SEAL.] *Notary Public, Pima County, A. T.*

(Endorsed:) No. 546. In the supreme court Territory of Arizona. James L. Utter and Elizabeth B. Voorhies, plaintiffs *vs.* Banjamin J. Franklin, C. P. Leitch and C. M. Bruce, loan commissioners of the Territory of Arizona, defendants. Petition. Filed Dec. 31, 1896. J. L. B. Alexander, clerk.

6 Whereas, by virtue of the authority of the act of the Legislative Assembly of the Territory of Arizona, entitled "An act to promote the construction of a certain railroad" approved, February 21st, 1883, the County of Pima in said Territory did on the first day of July A. D. 1883, issue its bonds each for the sum of one thousand dollars, to the number of one hundred and fifty, numbered consecutively 1 to 150 inclusive, and all of said bonds are in the same words and figures, of which the following is a copy, viz:

One thousand dollars. UNITED STATES OF AMERICA, *Territory of Arizona, County of Pima.* One thousand dollars.

The County of Pima in the Territory of Arizona, for value received promises to pay to the Arizona Narrow Guage Railroad Company, or bearer, at the office of the treasurer of said county, in the city of Tucson, on the first day of July A. D. one thousand nine hundred and three, the sum of one thousand dollars in lawful money of the United States, with interest thereon at the rate of

seven per cent. per annum, said interest payable at the office of the treasurer of Pima county, semi-annually, on the first day of January and the first day of July in each year, on presentation and surrender of the interest coupons hereto attached.

This bond is issued by the board of supervisors of said county of Pima, under and by virtue of an act of the legislature of Arizona entitled "An act to promote the construction of a certain railroad" passed by the Legislative Assembly of the Territory of Arizona, and approved by the governor thereof the 21st day of February A. D. 1883, and this bond is one of a series of two hundred issued in pursuance of said act and exchanged for a like number of bonds of said railroad company of like amounts, bearing like interest, and running like time as the bonds of which this is one.

In testimony whereof, the said county by its board of supervisors has caused this bond and the coupons hereto attached, to be
7 signed by the chairman of the board of supervisors, and countersigned by the clerk of said board, and by the county recorder of the said county of Pima, and the said clerk has affixed hereto the seal of said county, and the said recorder has affixed hereto the seal of said county recorder's office this first day of July A. D. 1883.

JAMES H. TOOLE,
Chairman Board Supervisors.
CHAS. R. DRAKE,
County Recorder. [SEAL.]

WILLIAM J. OSBORN,
Clerk Board of Supervisors. [SEAL.]

And to each of said bonds were attached forty coupons, numbered consecutively from 1 to 40, each for the sum of thirty-five dollars, and the first one became due January 1st, 1884, and the next one six months thereafter, and so on, one became due on the first day of January, and one the first day of July in each successive year, the last one on the first day of July, A. D. 1903.

And delivered the same with the coupons attached to the Arizona Narrow Guage Railroad Company as is provided for in said act.

And whereas, the said bonds and the interest coupons are now in the possession of, and the property of James L. Utter, who resides in Oak Hill, New York, and Elizabeth B. Voorhies, who resides in New York city, and who purchased the same in open market for good and valuable consideration by them paid to the then holders thereof.

And whereas, none of the said coupons attached to said bonds have been paid the whole of said bonds and all of the coupons attached, from coupons No. 8 to No. 27 inclusive is the amount
8 of principal and interest accrued up to January 1st, 1897 unpaid, viz: the sum of $1,700.00 on each of said one hundred and fifty bonds, making a total of $255,000.00 of principal and interest as aforesaid of the said bonds and said coupons — other evidences of indebtedness which were heretofore as aforesaid issued under the said authority of the legislature of Arizona, all of which said bonds

and coupons are here, and now offered for inspection by the loan commissioners.

And whereas, by act of Congress, entitled "An act amending and extending the provisions of an act of Congress entitled 'An act approving with amendments the funding act of Arizona, approved June twenty-fifth, eighteen hundred and ninety, and the act amendatory thereof and supplemental thereto,' approved August third eighteen hundred and ninety-four" approved June 6th, 1896—as follows:

Be it enacted, etc. That the provisions of the acts of Congress, approved June 25th, 1890 and August 3rd, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of the Territory, and the counties, municipalities, and school districts thereof, as provided in the act of Congress approved June 25th, 1890, until January 1st, 1897, and all outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities, and school districts thereof, heretofore authorized by legislative enactments of said Territory, bearing a higher rate of interest than is authorized by the aforesaid funding act, approved June 25th, 1890, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded into the lower interest-bearing bonds as provided by this act.

SEC. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the act of Congress, approved June 25th, 1890, and the act amendatory thereof and supplemental thereto, approved August 3rd, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory, as hereinbefore authorized to be funded, are hereby confirmed, approved and validated, and may be funded as in this act provided, until January 1st, 1897; provided, that nothing in this act shall be so construed as to make the Government of the United States liable or responsible for the payment of any of said bonds, warrants, or other evidences of indebtedness by this act approved, confirmed and made valid and authorized to be funded.

Approved June 6, 1896.

And whereas, on the 12th day of December A. D. 1896 the undersigned made a demand in writing on the board of supervisors of the said county of Pima that they report to the loan commissoners of the Territory of Arizona the said outstanding bonds and indebtedness for the purpose of and that said loan commissioners may as by law they are required to do, provide for the redeeming or refunding of the county indebtedness aforesaid.

And whereas, the said board of supervisors of said county have hitherto failed to comply with said demand, and have failed hith-

erto to make said report, and have hitherto failed to make such demand on the loan commissioners of said Territory;

Now therefore, we the undersigned owners of said bonds
10 and coupons having purchased the same for good and valuable consideration, hereby and now, in writing demand that you, the said loan commissioners of the Territory of Arizona require an official report from the board of supervisors of said county of Pima of their bonded and outstanding indebtedness including the indebtedness aforesaid as evidenced by said bonds and coupons.

And we also demand that said loan commissioners shall provide for the redeeming or refunding of the said county indebtedness, notwithstanding the said board of supervisors have failed to do their duty as aforesaid, and shall issue bonds for said indebtedness in redemption of the same as required by law.

And we here and now, having said bonds and coupons in hand for inspection and delivery, show the same to said loan commissioners and offer to deliver the same in exchange for bonds of the Territory as provided by law, viz: section seven of the act of March 19th, 1891 of Arizona, of the Laws of 1891 page 123, as provided for by the act of Congress approved June 25th, 1890 aforesaid.

Dated, Phœnix, Arizona, December 14th A. D. 1896.

JAMES L. UTTER.
ELIZABETH B. VOORHIES.

To B. J. Franklin, governor, C. P. Leitch, auditor, C. M. Bruce, secretary of the Territory, loan commissioners of the Territory of Arizona.

11 W. H. BARNES,
JOHN H. MARTIN,
Attorneys for Petitioners.

(Endorsed:) No. 546. In the supreme court Territory of Arizona. James L. Utter and Elizabeth B. Voorhies, plaintiffs *vs.* Benjamin J. Franklin, C. P. Leitch and C. M. Bruce, loan commissioners of the Territory of Arizona, defendants. Plaintiffs' "Exhibit A." A duplicate of the within filed in the office of the secretary of the loan commission of Arizona this 14th day of December, 1896. Alfred Franklin, secretary of loan commission. Filed Dec. 31, 1896. J. L. B. Alexander, clerk.

12 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and ELIZABETH VOORHIES, Plaintiffs, *vs.* BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. Bruce, Loan Commissioners of Arizona, Defendants.	Answer and Response to Writ.

The defendants named in the above-named cause come, and, for answer to the complaint and petition for mandamus herein say:

First.

They except to the sufficiency of the said petition herein, and demur thereto for the following reasons to wit:

1. Because the said complaint and petition fails to state facts sufficient to constitute a cause of action, and therefore mandamus in this action will not lie.

2. Because said petition seeks to compel the funding of bonds that were issued contrary to law, and in violation of the grant of powers given territorial legislatures by the laws of the Congress of the United States.

3. Because the said petition seeks to compel the funding of bonds heretofore declared void by this court, and by the Supreme Court of the United States, all of which this court judicially knows.

Wherefore defendants pray judgment.

13 Second.

For a further and second defense herein, defendants aver, and give the court to know that the said bonds herein declared on in this action, and for the funding of which this suit is brought to compel, are the same identical bonds that were involved in the suit in which —— Lewis was plaintiff, and The County of Pima in the Territory of Arizona was defendant, in which suit was brought on 2,250 coupons of said bonds in the district court of the said county of Pima and which were attached to these same bonds,—and in which suit these same bonds were placed in issue and the payment of which, together with the said coupons, was resisted on the grounds that the said bonds were issued contrary to, and in violation of law, and that the same were therefore void;—and that the same, and each and all of the said bonds were, in said action, each and every one of the same together with the said coupons thereto attached, by the judgment of the said court, after due deliberation, in open court adjudged to be void and of no binding force and obligation on the said county of Pima;—and that the said action was by appeal carried from said court to the supreme court of the Territory of Arizona, and was there on the 14th of April 1893, by said supreme court, affirmed, and the said bonds and the said coupons thereto attached were again, and by that court declared void and of no binding effect on the said county of Pima.

14 That an appeal was taken from the said decision of the said supreme court of the Territory of Arizona, to the Supreme Court of the United States, and in that court, at the October term of the same 1894, these same identical bonds were declared void and of no binding force and effect against the said county of Pima. Therefore defendants say and plead *res adjudicata*, and that therefore this action cannot be maintained.

Wherefore defendants pray the court that plaintiffs take nothing by this action, that their petition be dismissed, and that defendants

go hence without day, and have all of their costs in and about this action expended, and for all general relief.

B. J. FRANKLIN,
C. P. LEITCH, AND
C. M. BRUCE, *and*
Loan Commissioners & Defendants,
By the Attorney General.

(Endorsed:) No. 546. James L. Utter and Elizabeth Voorhies *vs.* B. J. Franklin *et al.* loan commissioners. Answer & response. Filed Jan'y 19, 1897. J. L. B. Alexander, clerk.

15 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and ELIZABETH VOORHEIS, Plaintiffs,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. BRUCE, Loan Commissioners of Arizona, Defendants.

And now comes the said plaintiffs, by Barnes & Martin, their attorneys, and to the said second defense of the said defendants in cause heretofore filed, and demur and say: that the same does not state facts sufficient to constitute any defense to said cause; nor does the same show any cause or reason why the writ of mandamus prayed for in this cause should not issue; and they therefore pray that the said writ do issue as prayed for, notwithstanding the said defense set up in said second answer.

By BARNES & MARTIN,
Attorneys for Plaintiffs.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter and Elizabeth Voorheis, plaintiffs *vs.* Benjamin J. Franklin, C. P. Leitch, and C. M. Bruce, loan commissioners of Arizona, defendants. Demurrer to answer. Filed January 19, 1897, J. L. B. Alexander, clerk.

16 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER and ELIZABETH B. VOORHIES, Petitioners,
vs.
B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. Bruce, Secretary, Loan Commissioners of the Territory of Arizona, Respondents.

I.

Comes the respondents and present this their first amended return and say: That the Legislative Assembly of the Territory of Arizona passed a certain act which was approved February 21st, 1883, wherein and whereby Pima county, in the Territory of Arizona, was commanded to make certain bonds, with interest coupons thereunto attached, the same being the bonds and coupons specified in the peti-

tioners' petition herein; that after the passage and approval of said act, certain persons interested in the issue of said bonds and coupons, demanded that said county should make and execute the same, and that in default thereof that they would be prosecuted under said act for failure so to do; that the defendants, The Board of Supervisors of said County, then believing that they had no option or discretion in the matter, and in obedience to said legislative command, did make said bonds and coupons, and cause the same
17 to be signed by its officers; that, not wishing or intending to deliver the said bonds or coupons until compelled so to do by a decree and command of a court having jurisdiction in the premises, — delivered said bonds and coupons to its treasurer in escrow, that is to say, that it instructed its said treasurer to deposit said bonds and coupons in the treasurer's vault of said county for safe keeping; that he should not, under any circumstances, not by virtue of any pretense whatsoever, deliver said bonds and coupons, or any thereof, to any person or persons, corporation or corporations whomsoever or whatsoever; but that, on the contrary thereof, he should safely and securely keep said bonds and coupons and each and all thereof, subject only to the order of the said board of supervisors of said county. That said treasurer did thereupon receive said bonds and coupons and all thereof, as aforesaid, and did deposit the same in his said treasurer's vault, and did then and there faithfully promise said county, that he would safely and securely keep said bonds and coupons and all thereof, and would only part with the possession of same and would only deliver the same on the order of the said board of supervisors.

And your respondents further allege that, afterwards, and without the knowledge or consent of the said board of supervisors or of said county, said treasurer did turn over said bonds to some per-
18 son or persons unknown to said county and to said board of supervisors; that said act of said treasurer in turning over and delivering said bonds and coupons was against the positive instructions, wish and will of said county, and of said board of supervisors, as *as* aforesaid, and was in violation of said instructions to said treasurer, and of his said promise as aforesaid. That said county nor said board of supervisors knew that said treasurer had turned over said bonds as aforesaid, until a long time after the same had been done; that said county, upon learning of the delivery of the said bonds and coupons as aforesaid, did at once all things in its power to discover where said bonds and coupons were, and in whose possession the same were, and to regain the possession thereof, but failed so to do; that said county never, in any way, nor to any extent, ratified such fraudulent and unauthorized delivery, either by the acknowledgement of the validity thereof or the payment of any interest thereon; but on the contrary thereof, always asserted that said bonds had not been delivered, were not the bonds of said county, and that said county would not pay the same, or any part thereof. Wherefore and by reason of the premises, as aforesaid, your respondents allege that said bonds and coupons were never delivered and are not now the bonds and coupons of said county.

II.

And for a further return, respondents allege: that said
19 bonds and coupons were printed and signed as aforesaid, in obedience to the said legislative command so to do, as aforesaid; that the same were designed by said legislative enactment to aid in the construction, equipment and operation of a certain line of railway running from the city of Tucson in said county to the town of Globe in the county of Gila, Territory of Arizona; that said line of railway was never constructed, equipped or operated; that said Arizona Narrow Gauge Railroad Company, to whom and in aid of which said bonds were commanded to be made and delivered, as aforesaid, was, at the time of the passage and approval of said legislative enactment, only a paper railroad; that said corporation was without means, credit or property; that its promoters, owners and representatives were without means, influence or reputation as monied or business men; and that whatever the intentions of said corporation or its said owners and promoters may have been, they were wholly unable to build, equip and operate said road; that for said bonds said county received no consideration whatsoever; that said railroad corporation has been abandoned for many years, and has not for many years been kept alive; that it did not and has not built nor operated said line of railway; that from the time of the receipt of the said bonds so fraudulently obtained, as aforesaid, said corporation has not existed save on paper; and that said bonds and coupons so made and signed by said county are void in law
20 and in equity; that at the time of the passage of the act of Congress that is alleged by petitioners to have validated said bonds and coupons, said railroad corporation had not existed in fact or in law for many years; that it had not constructed or operated its said line of railway; and that it was of no value whatever to the people of said Pima county; and that said bonds are not now, and have never been, outstanding obligations of said county.

III.

And for a further return, respondents allege: that heretofore, to wit: at the September term, 1891, of the district court of the first judicial district of the Territory of Arizona, sitting for the county of Pima, one Charles Edward Lewis brought his suit on the coupons that had then matured that were cut from said bonds, and all thereof, alleging in said suit that he was then the sole and only owner thereof; that he had purchased same in open market and for a valuable consideration; that said suit was brought against said county, and judgment was therein demanded against said county for the aggregate amount of said coupons then matured, together with interest thereon; that to said suit said county appeared and filed its answer thereto, among others, a demurrer, wherein and whereby, an issue of law was made, namely, that said bonds were not the
21 bonds of said county, for the reason that the said legislative enactment, in obedience to which the same had been made and signed, as aforesaid, was void, was contrary to the organic act

and said legislature had no authority whatsoever to enact the same; and that by reason thereof, said bonds and coupons had been made without any authority so to do, and were not therefore, the bonds and coupons of said county. That for the reasons aforesaid, the said district court sustained said demurrer and rendered judgment thereon in favor of said county; whereupon the said Lewis appealed said case to the supreme court of the Territory of Arizona, which said court thereafter affirmed the said judgment of the said district court; and that from said last judgment said Lewis again appealed said case to the Supreme Court of the United States. That said last-named court, after full consideration, held, in effect, that said bonds and coupons were wholly void, and for the reasons aforesaid, and by its judgment on said appeal, in all things affirmed the judgment of the said district court, and said respondents do now here plead said judgment as *res judicata*, as a finality to said bonds, as a bar to any and all present and future action on said coupons and bonds and both of them and as a defense thereto, in which respondents, and the said county, have acquired and now have a vested right, which cannot be in any way, nor to any extent divested, nor in any way nor to any extent taken away, either by the Congress of the United
22 States or by the Legislative Assembly of the Territory of Arizona.

IV.

And for a further return respondents allege: that heretofore, to wit: at the September term, 1891, of the district court of the first judicial district of the Territory of Arizona, sitting for the county of Pima, one Charles Edward Lewis, brought his suit on the coupons cut from said bonds specified and described in the petition of petitioners herein, and all of said coupons, alleging therein that he was then the sole owner of said bonds and coupons, and of all thereof; that he had purchased the same in open market and for a valuable consideration, and demanded judgment against said county for the aggregate amount of said coupons that had been matured, and for interest thereon; that in and to said suit said county appeared and filed its answer thereto, wherein and whereby, defendant first demurred to the complaint of the said Lewis, alleging as grounds for said demurrer, among others, that said complaint failed to state facts sufficient to constitute a cause of action; that said complaint failed to show that any part or portion of the line of railroad of the Arizona Narrow Gauge railroad was ever constructed or operated, or intended to be constructed or operated, or that the same is, was or was ever intended to be of any public utility, or in any sense to subserve a public use; that nothing is stated nor shown in
23 said complaint that the conditions precedent in said pretended legislative enactment contained, upon the happening of which the said treasurer of said county was attempted to be commanded by said legislative enactment to deliver said bonds in said complaint described, were in any way, nor to any extent, complied with, for that said treasurer ever delivered said bonds and coupons to any one; that said pretended act of the legislature is a manda-

tory command upon said county, and as such it is not a rightful subject of legislation, is *ultra vires* and void; that said pretended act of the legislature confers upon the Narrow Gauge Railroad Company, a corporation, an especial privilege that was, at that time, and from thence hitherto, as having been expressly forbidden by the organic act of said Territory; and that said legislature had no authority, and was without authority to pass said enactment, commanding and making an issue of said bonds and coupons, that by reason thereof said legislative enactment is void, and no authority exists, either at law or in fact, for the making or issuance of said bonds and coupons, and the same is therefore void.

That said county did, further, in its said answer to the said complaint, set up and allege each and all of the facts heretofore herein alleged, that said bonds and coupons, as aforesaid, had never been delivered by said county, to any person or persons, corporation or corporations, whatsoever or whomsoever; but that, on the
24 contrary thereof, the same had been delivered to the treasurer of said county, in escrow only, for safe keeping, and to be by said treasurer delivered only upon the order of the board of supervisors of said county; that said treasurer had, thereafter, and without the authority or knowledge and against the wish and will of said county, and of said board of supervisors, delivered said bonds and coupons to some person or persons, corporation or corporations, unknown to said county; that the delivery of said bonds was not made by the said treasurer, and was unknown to said treasurer until long after said delivery; that the said bonds and coupons were, by some person or persons, unknown to said county, and unknown to said board of supervisors, and without any right or authority so to do, abstracted from the said treasurer's vault in which the same had been placed by said treasurer for safe keeping.

That in and by said answer, the said county did set up and allege further as a defense thereto, that said act of the Legislative Assembly of the Territory of Arizona, commanding said county to make and deliver the bonds of said county to the said Arizona Narrow Gauge Railroad Company, in exchange for the bonds of said company, for an equal amount, had been enacted upon the belief that said company would build and operate a line of railway within the Territory of Arizona, and that thereby, the aid extended to said railroad corporation would be aid extended to a public way, and would be a
25 benefit to the residents; that unless said railway was built and operated it would not and could not be a public way, nor could the said aid in said case be extended to anything that could, in any way, nor to any extent, be of any public use or utility; that if said line of railway should not be built and operated, then the aid so commanded to be extended to it, as aforesaid, would be aid extended to a private use only, and as such the said legislative enactment would be wholly void; that by reason thereof the said county alleged in said answer that the said act of the Legislative Assembly of the Territory of Arizona, contained, by necessary implication, the proviso that said line of railway should be a public way, should be constructed and should be operated; and that such proviso and condi-

tion was and is a necessary condition precedent to the validity of said enactment and to the validity of the bonds and coupons made and issued, as aforesaid, the same being the bonds and coupons specified and described herein; that said line of railway was never built and was never operated, and that thereby and by reason thereof, no consideration whatsoever was ever received by said Pima county, for and on account of said bonds and coupons.

And said county did, in said answer, and as a defense to said suit, further allege that the said legislative enactment, by reason of which said bonds and coupons were made, as aforesaid, commanding
26 said county to make and deliver the same whether it wished to or not, *and* did not vest any, nor leave to said county any discretion whatsoever, whether it should make and deliver the same or not; and that said bonds and coupons, and each and all thereof, were made by said county in obedience to said legislative command, and for no other reason or cause whatsoever; that by reason thereof, no contract existed between said county and the said Arizona Narrow Gauge Railroad Company, to make and to deliver said bonds, or any thereof, unto said company, nor to its order; that said bonds and coupons were made by said county, as aforesaid, after the thirtieth day of July, 1886, at which time said legislative enactment was repealed and made void by the act of the Congress of the United States approved on said day, and known as "the Harrison act;" that said Harrison act repealed and nullified the said act of the legislature of the Territory of Arizona, commanding and making the issuance of said bonds and coupons, and for the reason that the indebtedness of said Pima county exceeded four per cent. of the assessed valuation of its said property, as assessed and equalized for the preceding year.

And respondents further allege that after the filing of the said answer, and after setting up therein the defenses and facts aforesaid, and after the decision of the said courts on said demurrer, as aforesaid, the petitioners herein obtained the possession, if they
27 ever did obtain the possession, of said bonds and coupons, and that by reason of the premises aforesaid their possession of said bonds and coupons was obtained with full notice of each and all of the defenses thereto, and with full notice of each and all of the said infirmities of said bonds and coupons, and that they took and received the same with full notice thereof; wherefore, and by reason of the premises aforesaid, your respondents allege, that said petitioners are not innocent holders of said bonds and coupons, or of any thereof, but on the contrary thereof, took and received same with full notice of the matters and things aforesaid.

And so your petitioners say, that said bonds and coupons were not "sold or exchanged in good faith, and in compliance of the act of the legislature by which they were authorized;" and that by reason thereof, said bonds and coupons, nor any thereof, have ever been authorized by any legislative enactments of the Territory of Arizona, or of the Congress of the United States, to be funded.

V.

And these respondents for a further return allege: That the so-called validating act of the Congress of the United States passed June 6th, 1896, nor any other enactment of the Congress of the United States, nor any enactment of the Legislative Assembly of the
28 Territory of Arizona, included, or to any extent, validated any of said bonds or coupons; that said act of Congress so passed pursuant to a memorial of the Legislative Assembly of the Territory of Arizona, asking that certain bonds and coupons issue-by certain of the counties of the said Territory, in aid of railroads, which had been sold in open market, which were held in good faith, the validity of which "for many years after their issuance was unquestioned, and acknowledged by the payment of the interest thereon as it fell due"; that the validity thereof was thereafter questioned, and to the end that such validity might be set at rest, Congress was asked to validate said bonds; that the bonds referred to in and by said memorial were the railway aid bonds issued by the counties of Yavapai and Maricopa in said Territory; that bonds had been issued by said Yavapai county in aid of the construction and operation of a certain line of railway in said county; that said railway pursuant to said contract was constructed and operated; that the bonds of said Yavapai county in aid thereof, were made and delivered to the said railroad company, and that, by means thereof a line of railway was constructed and operated, as aforesaid; that said Yavapai county, for many years paid the interest on said bonds as the same matured; that the said county of Maricopa issued its bonds in aid of a line of railway to be constructed in said county; that said line of railway was constructed and operated, pursuant to said contract; that the said bonds were by said
29 county delivered to the said railway company, and for many years thereafter, and since said time, has paid the interest thereon as the same accrued; that the said bonds and coupons made by Pima county, as heretofore herein specified, were not made by the wish, nor by the will of said Pima county, for the reason that the said The Arizona Narrow Gauge Railroad Company was wholly insolvent and had no means or credit, whereby and wherewith it could construct its line of railway, and that said county did not believe that it could, or would ever construct said line of railway, nor operate the same; and that, because of the command in said legislative enactment contained, wherein and whereby said Pima county was commanded to make said bonds and coupons, the same were made as aforesaid, and for no other reason whatsoever; that said line of railway was not constructed, nor was it operated; and that said Pima county never paid the interest thereon; that after the opinion in this case rendered by the Supreme Court of the United States, at its October term, 1898, the Twentieth Legislative Assembly of the Territory of Arizona, then being duly in session, by a great and overwhelming majority, adopted another memorial to the Congress of the United States, the same being known as House Memorial Number One, and the same being in words and figures as follows, to wit:

House Memorial No. 1.

To the Senate and House of Representatives of the United
30 States of America in Congress assembled:

Your memorialists, the Legislative Assembly of the Territory of Arizona, beg leave to submit to your honorable body, that,

Whereas, a memorial was presented to your honorable bodies by Eighteenth Legislative Assembly of the Territory of Arizona regarding bonds issued by certain counties of said Territory, which memorial was intended to apply only to such bonds as had been bought in good faith, and interest on which had been paid as stated in aforesaid memorial; and

Whereas, in response to said memorial your honorable bodies thereafter passed the act entitled "An act amending and extending the provisions of an act of Congress entitled An act approving, with amendments, the funding act of Arizona, approved June 6th, 1898; and

Whereas, based on said memorial an- act of June 6th, 1896, the Supreme Court of the United States has recently rendered a decision tending to recognize the validity of certain bonds issued by Pima county, Arizona Territory, to the Arizona Narrow Gauge railroad, under the provisions of the act of the Legislative Assembly of the Territory of Arizona, approved February 1st, 1883, and,

Whereas, before the passage of said memorial said bonds had been declared unauthorized and void by the district court of the first judicial district of the Territory of Arizona, in and for Pima county, by the supreme court of the Territory of Arizona, and by the Supreme Court of the United States, in the case of Lewis *vs.* The County of Pima, decided in the Supreme Court of the United States at its October, 1894, term; and

Whereas, said bonds issued to said Arizona Narrow Gauge Railroad Company were never acquired by said county in good faith, and were never sold by it in good faith or for a valuable consideration, and none of the interest on said bonds had ever been paid by Pima county, and the validity of said bonds had never been acknowledged by said county, and,

Whereas, the said Arizona Narrow Gauge railroad was never built and never existed, and Pima county has never received any consideration whatever for the said so-called bonds, and the entire scheme of the said bond issue was a fraud without any element of merit or good faith, and

Whereas, all the foregoing facts were and are notorious, and within the knowledge of every one who has had any dealings with said bonds, and

Whereas, it was by all the members of the legislature passing said memorial and by the governor of Arizona at the time,
31 and by the then delegate in Congress from Arizona, believed that all of said bonds so issued by Pima county to the Arizona Narrow Gauge Railroad Company were *res adjudicate* by the said decision of the Supreme Court of the United States, and that none of the said bonds could be thereafter validated, and

Whereas, said memorial was intended to apply only to certain railway aid bonds of two other counties in Arizona where the aided railways were actually constructed, and not to the said bonds so issued by Pima county, as to which none of the statements or reasons in said memorial applied, and which bonds were then as now believed to be without consideration, unjust, fraudulent and void.

Therefore, we most strongly urge upon the Senate and House of Representatives of the United States of America to pass such legislation as will exclude from the provisions of the act of Congress of June 6th, 1896, and from any and all other legislation by Congress the said bonds so issued by Pima county to the Arizona Narrow Gauge Railroad Company, so that neither said act of June 6th, 1896, or any other act will be construed so as to validate the said bonds issued by Pima county; and it is further

Resolved, That our delegate to Congress be and is hereby instructed to use all proper means to bring this subject to the careful and immediate consideration of Congress, in order to secure, if possible, from Congress such legislation as is prayed for herein, and that the secretary of the Territory be and he is hereby requested to transmit a copy of the foregoing memorial to each house of Congress and to our delegate to Congress."

And your respondents allege, that by reason of the premises aforesaid, the said bonds and coupons are not nor never were outstanding bonds of Pima county; that the said legislative command of said Territory that they be made and issued was without authority of law.

VI.

And respondents for a further return allege: That all of said coupons attached to said bonds that matured and became due
32 and payable more than five years next previous to the commencement of this action are barred by the statute of limitations in such case made and provided, and as to such coupons, and each thereof, your respondents hereby plead such statute of limitations hereto and in bar thereof.

VII.

And for a further return your respondents allege: That the said defendants, nor any nor either of them do now constitute the loan commission of the Territory of Arizona; that the said B. J. Franklin has long since departed this life, that the said C. M. Bruce is now a resident of the city of San Francisco in the State of California and that the said C. P. Leitch is not now, nor has been for more than a year last past, the auditor of said Territory; that said petition for a mandate asks that said mandate shall go against said B. J. Franklin, the said C. P. Leitch and the said C. M. Bruce in their individual capacity, and as members of the loan commission of said Territory; and for the reasons aforesaid, said individuals have not now the legal authority, nor power, to obey any mandate to them issued.

VIII.

And for a further return respondents allege: That the Twentieth Legislative Assemby of the Territory of Arizona, by an enactment duly passed, did repeal the loan commission of the Territory of Arizona, and that thereafter no loan commission exists, nor does
33 now exist, and there is now no power in the Territory of Arizona whereby said bonds can be funded, and that by reason of the premises the said petitioners are relegated to their action at law on said bonds.

IX.

And for a further return these respondents allege: That the said Pima county does not wish to fund said bonds and coupons, nor any thereof; and for the reason that if said bonds are funded, a new contract is thereby created, wherein and whereby said alleged indebtedness will not mature for fifty years next ensuing; and that said county, while your respondents constituted the loan commission of the Territory of Arizona, did officially notify said loan commission that it would not enter into such new contract, and would not consent to the funding of the said bonds, and did instruct said loan commission not to fund said bonds, and for the reason that, in funding said bonds, a new contract would be made to which said Pima county was not a party and would not be a party.

X.

And for further return respondents allege: That none of the bonds and coupons claimed to be owned by plaintiffs or either of them were sold or exchanged in good faith in accordance with the act of the Territory of Arizona under which they were issued, and defendants deny that plaintiffs, or either of them are holders or owners,
34 in good faith, and for a valuable consideration before maturity and without notice of any of said bonds or coupons.

XI.

And defendants further aver that heretofore, to wit, on November 23, 1882, the Arizona Narrow Gauge Railroad Company filed its original articles of association in the office of the secretary of the Territory of Arizona; that said articles were under the provisions of the laws of Arizona Territory relative to the incorporation of railroad companies, and that such articles contained, among other things the following statements and recitals:

"We, the undersigned residents of the Territory of Arizona, have subscribed and do hereby subscribe the number of shares and the sums representing the value thereof placed opposite our names hereunder to the capital stock of a corporation to be formed under the provisions of the general railroad and corporation act of Arizona Territory, approved February 14th, 1879 for the purpose of constructing, owning and maintaining railroads between the terminii and over the route described as follows:

The line begins at Tucson, Pima county, Territory of Arizona, thence, by the most favorable route in a northerly direction to a pass through the Tortilita mountains; thence in a northerly
35 direction along the San Pedro river to its mouth; thence in a northeasterly direction along the Gila River valley to San Carlos; thence in a northerly direction to the San Carlos River valley; thence in a northeasterly direction along the western slope of the White mountains to Fort Apache; thence in a northeasterly direction to the thirty-fifth parallel of north latitude, all of said line passing into and through the counties of Pima, Pinal, Graham Gila and Apache, of the Territory of Arizona, and the aggregate length of said railroad being about two hundred and ten miles."

That in said articles of incorporation were the subscriptions of eleven persons each in the amount of twenty thousand dollars to the capital stock of said proposed railroad, and that said articles also contain the following:

"Estimate of actual cost of constructing a railroad of three feet guage along the line set forth in the foregoing articles of association, together with the cost of right of way, motive power, depots, and stations, rolling stock, and other appurtenances and things for the completion and running of the road.

Estimate per Mile.

Right of way, station grounds and buildings	$300.00
Motive power	250.00
Cars of all kinds	210.00
Rails, fastenings and track-laying	6,300.00
Ties 2,640 per mile	1,300.00
Grading and bridging	5,100.00
Incidental and miscellaneous	400.00
Total cost per mile	13,860.00
Total cost of 210 miles	2,910,600.00

36 I, John P. Culver, hereby certify that I am a civil engineer by occupation and profession; that I have had examined the line of the road hereinbefore proposed and set forth, and have estimated the actual and contemplated cost of construction of said road, together with the cost of right of way, motive power, and every other appurtenance and thing for the completion and running of said road, and the actual contemplated cost as nearly as can be estimated is the sum of $2,910,600.00.

JNO. P. CULVER."

Defendants further aver that the said Arizona Narrow Gauge Railroad Company was the same Arizona Narrow Gauge Railroad Company referred to in act number 35 of the Twelfth Legislative Assembly of the Territory of Arizona, entitled "An act to promote the construction of a certain railroad."

XII.

Defendants further aver that before the time when any bonds of Pima county could lawfully be exchanged in good faith under the provisions of said act number 35, the bonds of Pima county being the same bonds claimed to be owned by plaintiffs herein, were by the agents of said Arizona Narrow Gauge Railroad Company wrongfully and without the order or consent of the board of supervisors of Pima county, abstracted from the possession of the treasurer of Pima county, who was holding said bonds and all of
37 them for safe keeping until a time when said bonds could lawfully and in good faith be delivered and exchanged, and that in lieu of said Pima County bonds one hundred and fifty bonds of the Arizona Narrow Gauge Railroad Company, each payable to Pima county or bearer, each in the sum of one thousand dollars, each dated ——, 1883, and each having interest coupons payable semi-annually attached thereto were left in the office of said treasurer of Pima county; and defendants further aver that said bonds of said Arizona Narrow Gauge Railroad Company are identical in amount, date and time of payment of principal and coupons with the bonds of Pima county claimed to be owned by plaintiffs herein.

XIII.

Defendants further aver that said Arizona Narrow Gauge Railroad Company is, and at all the times herein mentioned, was insolvent, and that the said company never built or operated any *any* part of the railroad proposed to be built and operated according to its said articles of incorporation, or any railroad, whatever, and that immediately after coming into possession of the bonds of Pima county claimed to be owned by plaintiffs herein it ceased all operations and business and pretense of doing business, and defendants aver that the bonds and coupons and all of them of said Arizona Narrow Gauge Railroad Company are and at all times have been worthless and without any value whatever, that immediately
38 upon being informed of the fact that the bonds of Pima county had come into the possession of the said railroad company the board of supervisors of Pima county used all their efforts within their power to recover possession of said bonds, and declined and refused to pay any interest on same and that no interest on said bonds was ever paid by said Pima county, and that said Arizona Narrow Gauge Railroad Company cannot now and never could perform its obligation to build said railroad or any part of it, and defendants aver that there is a total want of consideration for the said bonds and coupons and all of them claimed to be owned by plaintiffs herein, and a total failure of the consideration for said bonds and coupons and all of them.

XIV.

Defendants further aver that none of the said bonds and coupons of Pima county were negotiated or transferred by said Arizona Narrow Gauge Railroad Company till many years after the said rail-

road company had ceased to do any business of any sort and many years after the consideration for the bonds of said Pima county had wholly failed as aforesaid, and defendants aver that the original transferees of said bonds and coupons and all subsequent holders thereof and the plaintiffs and each of them herein had notice and knowledge prior to any transfer of said bonds and coupons of said Arizona Narrow Gauge Railroad Company of the purported con-
39 sideration of said bonds and of the insolvency of said railroad company and of the fact that it had not built and could not build the said railroad or any part thereof proposed by it to be built, and of the fact that the purpose of building said railroad had long prior thereto been abandoned and that all said transferees and holders of said bonds and coupons of said Pima county had notice and knowledge prior to any such transfer of same of the want of consideration and total failure of consideration of all of said bonds and coupons and knowledge and notice prior to any transfer of said bonds and coupons of all the facts herein set out and alleged.

XVI.

Defendants further aver that the cause of action on the coupons claimed to be owned by plaintiffs herein was not commenced and prosecuted within five years after the cause of action accrued, and defendants plead the statute of limitations of the Territory of Arizona to wit paragraph 2314, and the amendments thereto of the Revised Statutes of the Territory of Arizona, 1887.

XVII.

And for a further defense thereo defendants plead as a counter-claim or set-off the said bonds and coupons of the said Arizona Narrow Gauge Railroad Company hereinbefore set out and described,
40 and defendants aver that none of the said bonds or coupons have been paid, but that the same and all thereof are now due the said Pima county, so far as the same have matured and are unpaid.

Wherefor- defendants pray that they go hence with their costs.

ROCHESTER FORD,
C. W. WRIGHT,
Attornies for Respondents.

TERRITORY OF ARIZONA, } ss:
Pima County, }

M. G. Samaniego being by me first duly sworn on his oath says: That he is the chairman of the board of supervisors of said county; that affiant has carefully read the above and foregoing return and answer and knows well the contents thereof; and that same is true in substance and in fact of his own knowledge, save as to the matters and things therein stated on information and belief, and as to those matters affiant believes them to be true.

M. G. SAMANIEGO.

Subscribed and sworn to before me this 31st day of May, 1899.

[SEAL.] S. E. HAZZARD,
Notary Public.

My commission expires Sept. 30, 1901.

(Endorsed:) No. 546. In the supreme court. James L. Utter, *et al. vs.* B. J. Franklin, *et als.* Amended return. Copy of the within answer and return served on me this May 31st, 1899. Barnes, att'ys for petitioners. Filed June 1st, 1899. Lloyd Johnston, clerk.

41 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

To the attorney general of the Territory of Arizona:

You will take notice that on the first day of the next sitting of the supreme court of Arizona, or as soon thereafter as we can be heard, the petitioners will move the court to note the suggestion of the death of Elizabeth B. Voorhies one of the petitioners herein, and to substitute the names of George Albright, Wesley Albright, and William H. Maginnis, executors of the last will and testament of said deceased, in place of the said deceased, and that the cause hereafter proceed in the name of said *said* Utter and the said executors as petitioners, in accordance with the mandate of the Supreme Court of the United States, wherein said substitution has been heretofore made.

And that the said petitioners will at the same time and place also move the court for an order and decree directing the issuance of the mandamus prayed for in the petition herein, in execution of the mandate of the Supreme Court of the United States, to be directed to the Hon. Nathan O. Murphy, governor, the Hon. Charles
42 H. Akers, secretary of the Territory, and Hon. George W. Vickers, the auditor of said Territory, constituting said loan commissioners.

Very respectfully, BARNES & MARTIN,
Attorneys for Petitioners.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. Service of within admitted this 27th day of May 1899 C. F. Ainsworth, att'y general. James L. Utter, *et al. vs.* Benjamin J. Franklin, *et al.* Motion to make new parties and issue mandamus. Filed June 1st, 1899. Lloyd Johnston, clerk.

43 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA.

And now comes the petitioners by Barnes & Martin, their attorneys, and move the court to strike from the files the so-styled first amended return herein for the following reasons, namely:

1. The same was filed without leave of the court.

2. By the decision mandate and opinion of the Supreme Court of the United States in this case no new defenses or "returns" can be considered by this court.

3. This court in obedience to the mandate opinion and decision of the Supreme Court of the United States has no power to do other than direct the issuance of the writ of mandamus as prayed for in the petition herein and execute the decision of the Supreme Court of the United States by ordering a proper writ in accordance with the issues heretofore herein joined and decided.

By BARNES & MARTIN,
Attorneys for Plaintiffs.

(Endorsed:) No. 546. Utter *v.* Loan Com'rs. Mo. to strike. Service of the within admitted this 1st day of June 1899. C. F. Ainsworth, att'y general. Filed June 1st, 1899, Lloyd Johnston, clerk.

44 The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye, that we having examined the records and files in the office of the surrogate of the county of New York, do find there remaining a certain record of the last will and testament of Elizabeth B. Voorhees deceased, together with the probate thereof and the letters testamentary granted thereon (said will having been duly admitted to probate as a will of real and personal property on the twenty-eighth day of February in the year one thousand eight hundred and ninety-eight) in the words and figures following, to wit:

[N. Y. Surrogate's Seal.]

I, Elizabeth B. Voorhees, of the city, county and State of New York, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this instrument to be my last will and testament, hereby revoking all former wills by me made.

First: I direct the payment, by my executors, hereinafter named, of all my just debts and funeral expenses.

Second: I direct that after my decease my body be interred in the Albright family burying plot at Dryden, in the State of New
45 York, where my father, mother and one of my sisters are buried.

Third: I give and bequeath unto my husband, Luther C.

Voorhees, the sum of five hundred dollars in cash; one picture of Lincoln and his cabinet, one picture of General Grant, and the following books, to wit: History of the American Revolution, in two volumes, Life of Lincoln in one volume, Life of General Grant, in two volumes, and Seward's Travels Around the World, in one volume; the said pictures and books being now in my residence, No. 51 West 42nd street, New York city. I also give and bequeath unto my said husband the furniture now in his bed-room, at my said residence, consisting of one bedstead, one bureau, one table, chairs, pictures and ornaments.

Fourth: I hereby declare that all the furniture now contained in the basement of my residence No. 51 West 42nd street, New York city, and also the bedstead, two bureaus, one chair and one table, now in the room occupied by my brother George Albright, at my said residence, belong to my husband, Luther C. Voorhees, he having bought and paid for the same.

Fifth: I give and bequeath to my brother, George Albright the sum of five hundred dollars in cash; one cabinet bookcase, now in the parlor of my said residence; all the furniture now in my own bed-room at my said residence, consisting of one bedstead, one bureau, one lounge, tables, chairs, pictures and ornaments; the
furniture, pictures and ornaments now contained in the room
46 occupied by him at my said residence, excepting the bedstead, two bureaus, one chair and one table, which belong to my husband, Luther C. Voorhees; and also the oil painting by William Livingston Anderson, now in the parlor of my said residence.

Sixth: I give and bequeath to my brother, Harrizon Albright, the sum of five hundred dollars in cash.

Seventh: I give and bequeath to my brother, Aaron Albright, the sum of five hundred dollars in cash.

Eighth: I give and bequeath to my brother, Wesley Albright, the sum of five hundred dollars in cash.

Ninth: I give and bequeath to my sister, Anna Maria Lacey, the sum of one thousand dollars in cash.

Tenth: I give and bequeath to my sister, Elmina Lord, the sum of one thousand dollars in cash.

Eleventh: I give and bequeath to my sister, Samantha Cantine, the sum of one thousand dollars in cash.

Twelfth: I give and bequeath to my niece, Minnie J. Cantine, daughter of the said Samantha Cantine, the sum of one thousand dollars in cash; also the black cabinet and the piano now in the parlor of my said residence, one oil painting of cats and one picture of a bird on its nest.

Thirteenth: I give and bequeath to my nephew, George W. Albright, the sum of five hundred dollars in cash.

Fourteenth: I give and bequeath to my nephew Elisha A. Lacey, the sum of five hundred dollars in cash.

47 Fifteenth: I give and bequeath to my said sister Samantha Cantine and my said niece, Minnie J. Cantine, all of my diamonds and laces, share and share alike.

Sixteenth: I give and bequeath my red and blue India shawl to my sister Elmina Lord, with the request that upon her death she bequeath the same to my sister Samantha Cantine, or my niece Minnie J. Cantine, or if neither shall be living, then to my brother George Albright; and my other large India shawl I give and bequeath to my niece Sarah Albright Snyder, with the like request.

Seventeenth: I give and bequeath all my wearing apparel, not hereinbefore specifically bequeathed, to my sisters Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece Minnie J. Cantine, share and share alike.

Eighteenth: I give and bequeath all of my household furniture, not hereinbefore specifically bequeathed, including all silver, cutlery, dishes, linen and bedding, but excluding the chandeliers contained in my said residence, and also the sideboard and dining table now in the dining-room of my said residence, to my brother George Albright and my sister Samantha Cantine, share and share alike.

Nineteenth: I give and bequeath to Mrs. Carrie B. Land, of San Francisco, California, my ruby ring, and if she shall not be living at the time of my death, I give and bequeath the same to her then surviving daughters.

48 Twentieth: I direct that all the rest, residue and remainder of my estate, both real and personal, be sold and co-verted into cash by my executors, hereinafter named; and for that purpose I hereby expressly authorize and empower my said executors to sell and dispose of the same, or any part thereof, at public or private sale, and at such times and in such manner and for such sum or sums as to them, or a majority of them in the exercise of their best judgment, may seem most expedient; and to convey all or any part thereof: and I direct that my said executors shall then deduct and set aside from my said residuary estate the sum of three thousand dollars, and I give devise and bequeath the said sum of three thousand dollars to my said executors in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my husband Luther C. Voorhees, during his lifetime, and after his death, I give and bequeath the said sum of three thousand dollars, or the securities in which the same may then be invested, to my brother George Albright, if he be then living, and if he be not then living, I give and bequeath the same to my brothers Harrison Albright, Aaron Albright and Wesley Albright, my sisters Anna Maria Lacey, Almina Lord and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

49 Twenty-first: I direct that my said executors shall divide the balance or residue of my said residuary estate, remaining after the deduction of the said sum of three thousand dollars, into eight portions, and I give, devise and bequeath the same as follows to wit:

1. One of such eighth portions I give, devise and bequeath to my

said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary expenses, to my brother George Albright, during his lifetime, and after his death, I give and bequeath the said eighth portion to my brothers Harrison Albright, Aaron Albright and Wesley Albright, my sisters Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

2. One of such eighth portions I give, devise and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my brother Harrison Albright, during his lifetime, and after his death, I give and bequeath the said eighth portion to my brother George Albright, if he be then living, and if he be not then living, I give and bequeath the same to my brothers Aaron Albright and Wesley Albright, my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

50 & 51

3. One of such eighth portions I give, devise and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my brother Aaron Albright, during his lifetime, and after his death, I give and bequeath the said eighth portion to my brother George Albright, if he be then living, and if he be not then living. I give and bequeath the same to my brothers Harrison Albright and Wesley Alrbight, my sisters Anna Maria Lacey, Almina Lord and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

4. One of such eighth portions I give, devise and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my brother Wesley Albright, during his lifetime, and after his death, I give and bequeath the said eighth portion to my brother George Albright, if he be then living, and if he be not then living, I give and bequeath the same to my brothers Harrison Albright and Aaron Albright, my sisters Anna Maria Lacey, Elmina Lord, and Samantha Cantine, and my niece Linnie J. Cantine, or such of them as may then be living, share and share alike.

52

5. One of such eighth portions I give, devise and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income

therefrom, after deducting all taxes and necessary expenses, to my sister Anna Maria Lacey, during her lifetime, and after her death, I give and bequeath the said eighth portion to my brother George Albright, if he be then living, and if he be not then living I give and bequeath the same to my brothers Harrison Albright, Aaron Albright, and Wesley Albright, my sisters Elmina Lord and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

6. One of such eighth portions I give, devise and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my sister Elmina Lord, during her lifetime, and after her death, I give and bequeath the said eighth portion to my brother George
53 Albright, if he be then living, and if he be not then living, I give and bequeath the same to my brothers Harrison Albright, Aaron Albright and Wesley Albright, my sisters Anna Maria Lacey and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

7. One of such eighth portions I give, devise, and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my sister Samantha Cantine, during her lifetime, and after her death, I give and bequeath the said eighth portion to my brother George Albright, if he be then living, and if he be not then living, I give and bequeath the same to my brothers Harrison Albright, Aaron Albright and Wesley Albright, my sisters Anna Maria Lacey and Elmina Lord, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

8. One of such eighth portions I give, devise and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my niece Minnie J. Cantine during her lifetime,
54 and after her death, I give and bequeath the said eighth portion to my brother George Albright, if he be then living and if he be not then living, I give and bequeath the same to my brothers Harrison Albright, Aaron Albright and Wesley Albright, and my sisters Anna Maria Lacey, Elmina Lord and Samantha Cantine, or such of them as may then be living, share and share alike.

Twenty-second: Should any of the legacies herein lapse or fail for any reason, the same shall go to my brother George Albright, hereinbefore named, if living, and if not living, then to my brothers Harrison Albright, Aaron Albright and Wesley Albright, my sisters Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my

niece Minnie J. Cantine, or such of them as may be living, share and share alike.

Twenty-third: Should any of the trusts herein created, or attempted to be created, lapse or fail for any reason, then I give, devise and bequeath the property of such trust, or trusts or attempted trust or trusts, to my said brother George Albright, if living, and if not living, then to my brothers Harrison Albright, Aaron Albright and Wesley Albright, my sisters Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may be living, share and share alike.

Twenty-fourth: Should any of the persons herein named as legatees or beneficiaries, contest the validity of this my last will
55 and testament, or of any portion thereof, or in any way attempt to have this my last will and testament, or any portion thereof, declared void, it is my will that such person or persons shall not receive any legacy, bequest, income or benefit whatever from my estate.

Lastly: I hereby nominate and appoint my brother George Albright, my husband Luther C. Voorhees and my brother Wesley Albright, executors of this my last will and testament, and trustees of the several trust estates hereinbefore created. I direct that no bonds be required of them for the faithful discharge of their duties as such, and in case either of them shall refuse or be unable to act as such, or shall die, or resign, then I nominate and appoint William H. Maginnis, counsellor-at-law, of the city, county and State of New York, executor and trustee hereunder in place of the one so refusing, or who is unable to act, or who dies or resigns, and I direct that no bond be required of him for the faithful discharge of his duties as such.

It is my wish and direction that neither of my said executors and trustees (including the said William H. Maginnis, in case he shall be appointed as hereinabove provided,) shall have power to act alone, but that at least two of them shall concur in any act done hereunder.

In witness whereof, I have hereunto subscribed my name to this my last will and testament, written on eleven pages of paper,
56 at the city of New York aforesaid, the 12th day of August eighteen hundred and ninety-seven.

ELIZABETH B. VOORHEES.

Subscribed by the testatrix, Elizabeth B. Voorhees, in the presence of each of us and at the same time declared by her to us to be her last will and testament, and thereupon we, at the request of the said testatrix, and in her presence, and in the presence of each other, signed our names hereto as witnesses this 12th day of August, 1897, at New York city.

MARY HERSHFIELD,
41 *E. 67th St., New York City.*
CAROLINE BOWNE,
274 *West 71st St., New York City.*

57 Surrogate's Court, City and County of New York.

In the Matter of Proving the Last Will and Testament of ELIZABETH B. VOORHEES, Deceased, as a Will of Real and Personal Property.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Mary Hershfield of New York city, New York, being duly sworn as a witness in the above-entitled matter, and examined on behalf of the applicant to prove said will, says: I was well acquainted with Elizabeth B. Voorhees, now deceased; I knew the above-named decedent for more than fourteen years before her death. The subscription of the name of said decedent to the instrument now shown to me and offered for probate as her last will and testament, and bearing date the twelfth day of August in the year one thousand eight hundred and ninety-seven, was made by the decedent at the city of New York, on the twelfth day of August in the year one thousand eight hundred and ninety-seven, in the presence of myself and Caroline Bowne the other subscribing witness. At the time of such subscription the said decedent declared the said instrument so subscribed by her to be her last will and testament; and I thereupon signed my name as a witness at the end of said
58 instrument, at the request of said decedent, and in her presence.

The said decedent at the time of so executing said instrument, was upwards of the age of twenty-one years, and in my opinion of sound mind, memory and understanding, not under any restraint or in any respect incompetent to make a will. I also saw said Caroline Bowne, the other subscribing witness, sign her name as a witness at the end of said will, and know that she did so at the request, and in the presence of said decedent.

MARY HERSHFIELD.

Witness sworn and examined before me this 28 day of February, 1898.

BENJ. A. JACKSON,
Assistant to the Surrogate, New York County.

59 Surrogate's Court, City and County of New York.

In the Matter of Proving the Last Will and Testament of ELIZABETH B. VOORHEES, Deceased, as a Will of Real and Personal Property.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Caroline Bowne, of 274 West 71st street, New York city, being duly sworn as a witness in the above-entitled matter, and examined on behalf of the applicant to prove said will, says: I was well acquainted with Elizabeth B. Voorhees now deceased; I knew the above-named decedent for more than twenty years before her death. The subscription of the name of said decedent to the instrument

now shown to me and offered for probate as her last will and testament, and bearing date the twelfth day of August in the year one thousand eight hundred and ninety-seven, was made by the decedent at the city of New York, on the twelfth day of August in the year one thousand eight hundred and ninety-seven, in the presence of myself and Mrs. Mary Hershfield the other subscribing witness. At the time of such subscription the said decedent declared the
60 said instrument so subscribed by her to be her last will and testament; and I thereupon signed my name as a witness at the end of said instrument, at the request of said decedent, and in her presence.

The said decedent at the time of so executing said instrument, was upwards of the age of twenty-one years, and in my opinion of sound mind, memory and understanding, not under any restraint or in any respect incompetent to make a will. I also saw said Mrs. Mary Hirshfield, the other subscribing witness, sign her name as witness at the end of said will, and know that she did so at the request, and in the presence of said decedent.

CAROLINE BOWNE.

Witness sworn and examined before me this 3rd day of February, 1898.

JACOB WASHBURN,
Assistant to the Surrogate, New York County.

61 At a surrogate's court held in and for the county of New York, at the surrogate's office in the city of New York on the 28th day of February in the year 1898.

Present: Hon. Frank T. Fitzgerald, surrogate.

In the Matter of Proving the Last Will and Testament of ELIZABETH V. VOORHEES, Deceased.

The citation herein having been duly issued, served, and returned, the allegations of the parties appearing having been heard, and the proofs having been duly taken by the surrogate among other things as to the execution of said instrument bearing date Aug. 12th 1898, and the probate of the said will not having been contested, and it appearing to the surrogate that the will was duly executed and that the testatrix at the time of executing it was in all respects competent to make a will and not under restraint,

it is ordered, adjudged and decreed that the instrument offered for probate herein be and the same hereby is admitted to probate as the last will and testament of the said deceased valid to pass real and personal property and that letters testamentary be issued thereon to the executors who may qualify thereunder.

FRANK T. FITZGERALD, *Surrogate.*

62 The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or whom they may concern, send greeting:

Know ye, that at the county of New York, on the 28th day of February in the year of our Lord one thousand eight hundred and ninety-eight before Hon. Frank T. Fitzgerald a surrogate of our said county, the last will and testament of Elizabeth B. Voorhees deceased, was proved, and is now approved and allowed by us; and the said deceased having been at the time of her death a resident of the county of New York, by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels and credits of the said testatrix and also the auditing, allowing and final discharging the account thereof, doth belong unto us, the administration of all and singular the goods, chattels and credits of the said deceased and any way concerning her will, is granted unto George Albright and Luther C. Voorhees, each of the county and State of New York, and Wesley Albright of McLean, Tompkins Co. N. Y. the executors in the said will named, they being first duly sworn, well, faithfully and honestly to discharge the duties of such executors.

In testimony whereof, we have caused the seal of office of the surrogate's court of the county of New York to be hereunto affixed.

63 Witness, Hon. Frank T. Fitzgerald a surrogate of our said county, at the city of New York, the 7th day of March in the year of our Lord one thousand eight hundred and ninety-eight and of our Independence the one hundred and 22nd.

J. FAIRFAX McLAUGHLIN,
[L. S.] *Clerk of the Surrogate's Court.*

64 Surrogate's Court, New York County.

In the Matter of the Application of WILLIAM H. MAGINNIS for the Issue to Him of Letters Testamentary under the Will of Elizabeth B. Voorhees, Deceased.

To the surrogate's court of the county of New York:

The undersigned, by this his petition, respectfully shows:

I. That on November 18th 1897, the said Elizabeth B. Voorhees, departed this life in the city of New York, leaving a will, which was, on the 28th day of February, 1898, proved and duly admitted to probate by the surrogate of this county, which will is recorded in Liber 581 of Wills at page 349.

II. That to the executors named in said will, viz: George Albright, Luther C. Voorhees, and Wesley Albright, letters testamentary were duly issued on March 7th, 1898, and they thereupon duly qualified and entered upon the discharge of the duties of their said office.

III. That thereafter and on or about August 23, 1898, said

Luther G. Voorhees departed this life leaving but two of
65 said executors now living.

IV. That said wil contained, among other things, the following provision:

"Lastly, I hereby nominate and appoint my brother George Albright, my husband Luther C. Voorhees and my brother Wesley Albright, executors of this my last will and testament, and trustees of the several trust estates hereinbefore created. I direct that no bonds be required of them for the faithful discharge of their duties as such, and in case either of them shall refuse or be unable to act as such, or shall die, or resign, then I nominate and appoint William H. Maginnis, counsellor-at-law, of the city, county and State of New York, executor and trustee hereunder in place of the one so refusing, or who is unable to act, or who dies or resigns, and I direct that no bond be required of him for the faithful discharge of his duties as such."

Whereby your petitioner is entitled to qualify and receive letters testamentary under said will, he having never in any manner renounced his right to qualify as such executor of said will.

Wherefore your petitioner prays that letters testamentary may be issued to him by this court under the said last will and testament of said Elizabeth B. Voorhees, deceased, in the place of Luther C. Voorhees, also deceased, and that your petitioner be per-
66 mitted to qualify as such, and as in duty bound your petitioner will ever pray.

Dated New York, October 27th, 1898.

WILLIAM H. MAGINNIS, *Petitioner.*

STATE OF NEW YORK, } ss.:
County of New York, }

William H. Maginnis, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

WILLIAM H. MAGINNIS.

Subscribed and sworn to before me October 28th 1898.

[L. S.] CHAS. E. COLSTON,
Notary Public, No. 163, *N. Y. Co.*

67 At a term of the surrogate's court of the county of New York, held at the court-house in the city of New York on November 1st, 1898.

Present: Hon. John H. V. Arnold, surrogate.

In the Matter of the Application of WILLIAM H. MAGINNIS for the Issue to Him of Letters Testamentary under the Will of Elizabeth B. Voorhees, Deceased.

On reading and filing the petition of William H. Maginnis hereto annexed, verified October 28th 1898, and on the will of Elizabeth B. Voorhees, deceased, heretofore admitted to probate in this court, and on motion of John Cummins, attorney for said William H. Maginnis, it is

Ordered, adjudged and decreed that letters testamentary under the will of Elizabeth B. Voorhees, deceased, be issued to said William H. Maginnis, in the place of Luther C. Voorhees deceased, and that said William H. Maginnis may qualify hereunder.

JOHN H. V. ARNOLD, *Surrogate.*

68 The People of the State of New York, by the grace of God free and independent, to all — whom these presents shall come or whom they may concern, send greeting:

Know ye, that at the county of New York, on the 28th day of February in the year of our Lord one thousand eight hundred and ninety-eight before Hon. Frank T. Fitzgerald a surrogate of our said county, the last will and testament of Elizabeth B. Voorhees deceased, was proved, and in now approved and allowed by us; and the said deceased having been at the time of her death a resident of the county of New York, by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels and credits of the said testatrix and also the auditing, allowing and final discharging the account thereof, doth belong unto us, the administration of all and singular the goods, chattels and credits of the said deceased and any way concerning her will, is granted unto William H. Maginnis of the county and State of New York, (in conjunction with George Albright and Wesley Albright who heretofore qualified, Luther C. Voorhees who heretofore qualified having died), an executor in the said will named, he being first duly sworn, well, faithfully and honestly to discharge the duties of such executor

In testimony whereof, we have caused the seal of office of the surrogate's court of the county of New York to be hereunto affixed.

69 Witness, Hon. Frank T. Fitzgerald surrogate of our said county, at the city of New York, the 7th day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

[L. S.] J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

70 All which we have caused by these presents to be exemplified, and the seal of our said surrogate's court to be hereunto affixed.

Witness, Hon. John H. V. Arnold, a surrogate of the county of New York, at the city of New York, the first day of November in

the year of our Lord one thousand eight hundred and ninety-eight of our Independence the one hundred and twenty-third.

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

I, John H. V. Arnold, a surrogate of said county, and presiding magistrate of the surrogate's court, do hereby certify that J. Fairfax McLaughlin, whose name is subscribed to the preceding exemplification, is the clerk of said surrogate's court of the county of New York, and that full faith and credit are due to his official acts. I further certify, that the seal affixed to the exemplification is the seal of our said surrogate's court, and that the attestation thereof is in due form, and according to the form of attestation used in this State.

Dated, New York, November 1st, 1898.

JOHN H. V. ARNOLD, *Surrogate.*

(10c. I. R. stamp.)

STATE OF NEW YORK, }
County of New York, } *ss:*

71 I, J. Fairfax McLaughlin, clerk of the surrogate's court of the county of New York, do hereby certify that Hon. John H. V. Arnold, whose name is subscribed to the preceding certificate, is the presiding magistrate of the surrogate's court of the county of New York, duly elected, sworn and qualified, and that the signature of said magistrate to said certificate is genuine.

In testimony whereof, I have hereto set my hand and [SEAL.] affixed the seal of the said court, this 1st day of November, 1898.

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

(10c. I. R. stamp.)

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter *et al. vs.* B. J. Franklin, *et al.* Exemplified copy of will and the appointment of executors of the last will. Filed June 5th, 1899. Lloyd Johnston, clerk.

72 In the Supreme Court of the Territory of Arizona, of the January Term, 1899.

JAMES L. UTTER ET AL. }
vs.
THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA. }

L. H. Hole being first duly sworn on oath states: That he is the agent of plaintiffs in his behalf; that he knew Elizabeth B. Voorhees in her lifetime; that she resided in the county of New York and in the State of New York and that she departed this life on about November 18th, 1897. He states that at the time of her death she was the owner of thirty of the bonds described in the petition

herein with coupons thereof, since January 1st, 1895 and that the same were a part of her estate at the time of her death and that they became the subject of administration in the State of New York. He files with this affidavit a certified copy of the will of said deceased and the probate thereof in the surrogate court of the county of New York, State of New York and also copy of letters testamentary granting to William H. Magginas and George Albright and Westly Albright and Luther C. Voorhees the appointment of executors of the last will and testament of the said Elizabeth, deceased.

He states that they entered upon their duties and among
73 other things the said bonds came into their hands and possession for due administration according to law.

He makes this affidavit in support of the motion heretofore filed in said cause to substitute the said executors as petitioners herein in place of the said Elizabeth, deceased and further affiant sayeth not.

L. H. HOLE.

Subscribed and sworn to before me this 5th day of June, A. D., 1899.

[SEAL.] LLOYD JOHNSTON,
Clerk Supreme Court of the Territory of Arizona.

(Endorsed:) 546. In the supreme court of the Territory of Arizona. James L. Utter *et al. vs.* B. J. Franklin, *et al.* Affidavit of L. H. Hole as to will. Filed June 5th, 1899. Lloyd Johnston, clerk.

(Carbon copy of the foregoing affidavit filed with the following endorsement.)

Affidavit in support of motion to substitute parties. No. 546. In the supreme court Territory of Arizona. James L. Utter, *et al. vs.* Loan Commissioners. Service by copy admitted this 7th day of June 1899. C. W. Wright, of counsel for respondents. Filed June 8th, 1899. Lloyd Johnston, clerk.

74 Supreme Court of the United States, October Term, 1898.

JAMES L. UTTER and ELIZABETH B. VOORHIES, Appellants,
vs.
B. J. FRANKLIN, Governor, ET AL. } No. 94.

The death of Elizabeth B. Voorhies, one of the appellants, having been suggested, now, on motion of Mr. Frederic D. McKenney, of counsel for the appellants, it is ordered by the court that George Albright, Wesley Albright and W. H. Maginnis, executors of the said Elizabeth B. Voorhies, deceased, be, and they are hereby, made parties appellants in this cause.

April 25, 1899.

A true copy.
Test:
[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) No. 546. In the supreme court, of the Territory of Arizona. James L. Utter *et al. vs.* Loan Commissioners of Arizona. Order of U. S. Supreme Court. Filed July 31st, 1899. Lloyd Johnston, clerk.

75 Supreme Court of the United States, October Term, 1898.

JAMES L. UTTER and GEORGE ALBRIGHT, WESLEY ALBRIGHT, and W. H. Maginnis, Executors of Elizabeth B. Voorhies, Appellants,
vs.
B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. Bruce, Secretary, Loan Commissioners of the Territory of Arizona. } No. 94.

Appeal from the supreme court of the Territory of Arizona.

This cause came on to be heard on the transcript of the record from the supreme court of the Territory of Arizona, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the order of the said supreme court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said supreme court for further proceedings not inconsistent with the opinion of this court.

April 25, 1899.

A true copy.
Test:
[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter *et al. v.* Loan Commissioners of Arizona. Decree of U. S. Supreme Court. Filed July 31st, 1899. Lloyd Johnston, clerk.

76 I, Elizabeth B. Voorhees, of the city, county and State of New York, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this instrument to be my last will and testament, hereby revoking all former wills by me made.

First. I direct the payment by any executors hereinafter named of all my just debts and funeral expenses.

Second. I direct that after my decease, my body be interred in the Albright family burial plot at Dryden, in the State of New York, where my father, mother and one of my sisters are buried.

Third. I give and bequeath unto my husband, Luther C. Voorhees, the sum of five hundred dollars ($500.00) in cash, one (1) picture of Lincoln and his cabinet, one (1) picture of General Grant, and the following books, to wit: History of the American Revolution in two volumes, Life of Lincoln in one volume, Life of General Grant in

two volumes and Seward's Travels Around the World in one volume, the said pictures and books being now in my residence, No. 51 West Forty-second street, New York city.

I also give and bequeath unto my said husband the furniture now in his bed-room at my said residence, consisting of one bedstead, one bureau, one table, chairs, pictures and ornaments.

Fourth. I hereby declare that all the furniture now con-
77 tained in the basement of my residence No. 51 West Forty-second street, New York city, and also the bedstead, two bureaus, one chair and one table now in the room occupied by my brother George Albright, at my said residence belong to my husband, Luther C. Voorhees, he having bought and paid for the same.

Fifth. I give and bequeath to my brother, George Albright, the sum of five hundred dollars ($500.00) in cash, one cabinet bookcase now in the parlor of my said residence, all the furniture now in my own bed-room at my said residence, consisting of one bedstead, one bureau, one lounge, tables, chairs, picture and ornaments, the furniture, pictures and ornaments now contained in the room occupied by him at my said residence, excepting the bedstead, two bureaus, one chair and one table, which belongs to my husband, Luther C. Voorhees, and also the oil painting by William Livingston Anderson now in the parlor of my said residence.

Sixth. I give and bequeath to my brother, Harrison Albright, the sum of five hundred dollars ($500.00) in cash.

Seventh. I give and bequeath to my brother, Aaron Albright, the sum of five hundred dollars ($500.00) in cash.

Eighth. I give and bequeath to my brother, Wesley Albright, the sum of five hundred dollars ($500.00) in cash.

Ninth. I give and bequeath to my sister, Anna Maria Lacey, the sum of one thousand dollars ($1,000.00) in cash.

Tenth. I give and bequeath to my sister, Elmina Lord, the sum of one thousand dollars ($1,000.00) in cash.

78 Eleventh. I give and bequeath to my sister, Samantha Cantine, the sum of one thousand dollars ($1,000.00) in cash.

Twelfth. I give and bequeath to my niece, Minnie J. Cantine, daughter of the said Samantha Cantine, the sum of one thousand dollars ($1,000.00) in cash, also the black cabinet and the piano now in the parlor of my said residence, one oil painting of "cats" and one picture of "a bird on its nest."

Thirteenth. I give and bequeath to my nephew, George W. Albright, the sum of five hundred dollars ($500.00) in cash.

Fourteenth. I give and bequeath to my nephew, Elisha A. Lacey, the sum of five hundred dollars ($500.00) in cash.

Fifteenth. I give and bequeath to my said sister, Samantha Cantine and my said niece, Minnie J. Cantine, all of my diamonds and laces, share and share alike.

Sixteenth. I give and bequeath my red and blue India shawl to my sister, Elmina Lord, with the request that upon her death she bequeath the same to my sister, Samantha Cantine, or my niece, Minnie J. Cantine, or if neither shall be living then to my brother,

George Albright; and my other large India shawl I give and bequeath to my niece, Sarah Albright Snyder, with the like request.

Seventeenth. I give and bequeath all my wearing apparel not hereinbefore specifically bequeathed to my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, share and share alike.

Eighteenth. I give and bequeath all of my household furniture not hereinbefore specifically bequeathed, including all silver, cutlery, dishes, linen and bedding, but excluding the chandeliers, contained in my said residence, and also the sideboard and dining table now in the dining-room of my said residence, to my brother, George Albright, and my sister, Samantha Cantine, share and share alike.

Nineteenth. I give and bequeath to Mrs. Carrie B. Land, of San Francisco, California, my ruby ring, and if she shall not be living at the time of my death I give and bequeath the same to her then surviving daughters.

Twentieth. I direct that all the rest, residue and remainder of my estate, both real and personal, be sold and converted into cash by my executors hereinafter named, and for that purpose I hereby expressly authorize and empower my said executors to sell and dispose of the same or any part thereof at public or private sale, and at such times and in such manner and for such sum or sums as to them or a majority of them in the exercise of their best judgment may seem most expedient, and to convey all or any part thereof; and I direct that my said executors shall then deduct and set aside from said residuary estate the sum of three thousand dollars ($3,000.00), and I give, devise and bequeath the said sum of three thousand dollars ($3,000.00) to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary expenses to my husband, Luther C. Voorhees, during his lifetime, and after his death I give and bequeath the said sum of three thousand dollars ($3,000.00) or the securities in which the same may then be invested to my brother, George Albright, if he be then living, and if he be not then living I give and bequeath the same to my brothers, Harrison Albright, Aaron Albright and Wesley Albright, my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

Twenty-first. I direct that my said executors shall divide the balance or residue of my said residuary estate remaining after the deduction of the said sum of three thousand dollars ($3,000.00) into eight portions and I give, devise and bequeath the same as follows, to wit:

1. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income

therefrom after deducting all taxes and necessary expenses to my brother, George Albright, during his lifetime, and after his death I give and bequeath the said eighth portion to my brothers,
81 Harrison Albright, Aaron Albright and Wesley Albright, my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

2. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary expenses to my brother, Harrison Albright, during his lifetime, and after his death I give and bequeath the said eighth portion to my brother, George Albright if he be then living, and if he be not then living I give and bequeath the same to my brothers, Aaron Albright and Wesley Albright, my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

3. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities and to pay over the income therefrom after deducting all taxes and necessary expenses to my brother, Aaron Albright, during his lifetime, and after his death I give and bequeath the said eighth portion to my brother,
82 George Albright, if he be then living, and if he be not then living I give and bequeath the same to my brothers, Harrison Albright and Wesley Albright, my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

4. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary expenses to my brother, Wesley Albright, during his lifetime, and after his death I give and bequeath the said eighth portion to my brother, George Albright, if he be then living, and if he be not then living I give and bequeath the same to my brothers, Harrison Albright and Aaron Albright, my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

5. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary expenses to my sister, Anna Marie Lacey, during her lifetime, and after her
83 death I give and bequeath the said eighth portion to my brother, George Albright if he be then living, and if he be

not then living I give and bequeath the same to my brothers, Harrison Albright, Aaron Albright and Wesley Albright, my sisters, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

6. One of such eight- portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities and to pay over the income therefrom after deducting all taxes and necessary expenses to my sister Elmina Lord, during her lifetime, and after her death I give and bequeath the said eight- portion to my brother, George Albright, if he be then living, and if he be not then living I give and bequeath the same to my brothers, Harrison Albright, Aaron Albright and Wesley Albright, my sisters, Anna Maria Lacey and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

7. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary
84 expenses to my sister, Samantha Cantine, during her lifetime, and after her death I give and bequeath the said eighth portion to my brother, George Albright if he be then living, and if he be not then living I give and bequeath the same to my brothers, Harrison Albright, Aaron Albright and Wesley Albright, my sisters, Anna Maria Lacey and Elmina Lord, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

8. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary expenses to my niece, Minnie J. Cantine, during her lifetime, and after her death I give and bequeath the said eighth portion to my brother, George Albright if he be then living, and if he be not then living I give and bequeath the same to my brothers, Harrison Albright, Aaron Albright and Wesley Albright, and my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, or such of them as may then be living, share and share alike.

Twenty-second. Should any of the legacies herein lapse, or fail for any reason, the same shall go to my brother, George Albright, hereinbefore named, if living, and if not living, then to my brothers, Harrison Albright, Aaron Albright and Wesley Albright, my sisters,
Anna Maria Lacey, Elmina Lord and Samantha Cantine,
85 and my niece, Minnie J. Cantine, or such of them as may be living, share and share alike.

Twenty-third. Should any of the trusts herein created, or attempted to be created, lapse or fail for any reason, then I give, de-

vise and bequeath the property of such trust or trusts, or attempted trust or trusts, to my said brother, George Albright, if living, and if not living, then to my brothers, Harrison Albright, Aaron Albright and Wesley Albright my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may be living, share and share alike.

Twenty-fourth. Should any of the persons here named as legatees or beneficiaries contest the validity of this my last will and testament, or of any portion thereof, or in any way attempt to have this my last will and testament or any portion thereof declared void, it is my will that such person or persons shall not receive any legacy, bequest, income or benefit whatever from my estate.

Lastly. I hereby nominate and appoint my brother, George Albright, my husband, Luther C. Voorhees, and my brother, Wesley Albright, executors of this my last will and testament and trustees of the several trust estates hereinbefore created.

I direct that no bonds be required of them for the faithful discharge of their duties as such, and in case either of them shall
86 refuse or be unable to act as such, or shall die or resign, then I nominate and appoint William H. Maginnis, counsellor-at-law, of the city, county and State of New York, executor and trustee hereunder in place of the one so refusing or who is unable to act, or who die or resign, and I direct that no bond be required of him for the faithful discharge of his duties as such.

It is my wish and direction that neither of my said executors and trustees (including the said William H. Maginnis in case he shall be appointed as hereinabove provided) shall have power to act alone, but that at least two of them shall concur in any act done hereunder.

In witness whereof, I have hereunto subscribed my name to this my last will and testament written on 11 pages of paper at the city of New York aforesaid, the 12th day of August, 1897.

(Signed) ELIZABETH B. VOORHEES.

Subscribed by the testatrix, Elizabeth B. Voorhees, in the presence of each of us and at the same time declared by her to us to be her last will and testament, and thereupon we, at the request of the said testatrix and in her presence and in the presence of each other, sign our names hereto as witnesses this 12th day of August, 1897, at New York city.

(Signed) MARY HERSHFIELD,
41 *East 67th Street, N. Y. City.*
CAROLINE BOWNE,
274 *West 71st Street, N. Y. City.*

87 In the Probate Court of Maricopa County, Territory of Arizona.

In the Matter of the Estate of ELIZABETH B. VOORHEES, Deceased.

Oath of Office of Executors.

STATE OF NEW YORK, } ss:
County of Tompkins, }

George Albright, being duly sworn, deposes and says that he will support the Constitution of the United States and the laws of the United States and Territory of Arizona, and will faithfully perform his duties as an executor of the will of Elizabeth B. Voorhees.

GEO. ALBRIGHT.

Sworn to before me this 10th day of July, 1899.

GEO. E. MONROE,
Notary Public.

[SEAL.]

88 In the Probate Court of Maricopa County, Arizona Territory.

In the Matter of the Estate of ELIZABETH B. VOORHEES, Deceased.

Oath of Office of Executors.

STATE OF NEW YORK, } ss:
County of Tompkins, }

Wesley Albright, being duly sworn, deposes and says that he will support the Constitution of the United States and the laws of the United States and Territory of Arizona, and will faithfully perform his duties as an executor of the will of Elizabeth B. Voorhees.

WESLEY ALBRIGHT.

Sworn to before me this 10th day of July, 1899.

GEO. E. MONROE,
Notary Public.

[SEAL.]

89 In the Probate Court of Maricopa County, Arizona Territory.

In the Matter of the Estate of ELIZABETH B. VOORHEES, Deceased.

Oath of Office of Executors.

STATE OF NEW YORK, } ss:
County of New York, }

William H. Maginnis, being duly sworn, deposes and says that he will support the Constitution of the United States and the laws of the United States and Territory of Arizona, and will faithfully perform his duties as an executor of the will of Elizabeth B. Voorhees.

WILLIAM H. MAGINNIS.

Sworn to before me this 15th day of August, 1899.

LOUISE HEISLAR,
[SEAL.] *Notary Public, Kings Co.*

Commission filed in New York Co.

90 *Letters Testamentary.*

Copy.

In the Probate Court of the County of Maricopa, Territory of Arizona.

In the Matter of the Estate of ELIZABETH B. VOORHEES, Deceased.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

The last will of Elizabeth B. Voorhees deceased, a copy of which is hereto annexed, having been proven and recorded in the probate court of the county of Maricopa, Territory of Arizona, George Albright, Wesley Albright and William H. Maginnis who are named therein as such, are hereby appointed executors.

Witness, N. A. Morford clerk of the probate court of the
[SEAL.] county of Maricopa Territory of Arizona, with the seal of said court affixed, this eighth day of September A. D. 1899.

By order of the court.

N. A. MORFORD, *Clerk.*

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, N. A. Morford judge and *ex officio* clerk of the probate court in and for the county of Maricopa, Territory of Arizona, hereby
91 certify the within and foregoing to be a full, true and correct copy of letters testamentary issued in the therein-entitled matter, as the same remains of record and on file in the office of said clerk; I further certify that said letters have not been revoked.

I further certify that the copy of the will attached hereto is a true copy of the will now on file in my office, in said estate.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this eighth day of September A. D. 1899.

[SEAL.] N. A. MORFORD, *Clerk.*

(10c. I. R. stamp.)

(Endorsed:) No. 546. In the supreme court, Territory of Arizona. James L. Utter, *et al. vs.* Loan Commissioners. Certified copy letters testamentary, issued out of the probate court of Maricopa county to George Albright *et al.* as executors of the estate of Elizabeth B. Voorhees, deceased. Filed Sept. 8th, 1899. Lloyd Johnston, clerk.

92 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER and THE EXECUTORS OF THE ESTATE OF ELIZABETH B. VOORHIES, Petitioners,
against
LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

I.

Come now the petitioners, and not in any way waiving their motion to dismiss and strike out the answer attempted to be filed in this case for the reason that the same was filed without leave of the court, and after a trial had been had in said cause, and for the further reason that judgment has been rendered in said cause, and for the further reason that the filing of the same disregards the decision and mandate of the Supreme Court of the United States, reasserts the same defenses which were asserted in the cause before the appeal to that court, and is in contempt of its mandate, come and defend against the said answer as follows, to wit:

That the first subdivision of the said answer does not state facts sufficient to show any reason why the prayer of the petition should not be granted, and for reply thereto and to each and all the subdivisions of said answer, the petitioners defend and deny all the material allegations of said subdivision, and they allege that the
93 said bonds were delivered to the railroad company in the said subdivision mentioned, with the full knowledge, direction, approval and consent of the board of supervisors of the said county of Pima, and they allege that after said bonds were so delivered said board of supervisors ratified and confirmed the delivery of the same, recognized the same as valid by paying interest coupons thereon, and they also acknowledged, ratified and confirmed the said delivery by exchanging the coupons of the bonds of said railroad company described in said subdivision for the interest coupons of the said bonds of Pima county which had before that time been delivered.

And said petitioners allege that the said bonds of Pima county described in the petition were delivered to the railroad company therein described in exchange for the first-mortgage bonds of said railroad company of a like amount, drawing the same rate of interest. The said bonds of said railroad company were delivered to and received and accepted by said county of Pima, and they have remained in the treasury of the said county ever since, and are now in the treasury of the county and the property of the county. That the said bonds of Pima county were made, executed, issued and delivered to the said Arizona Narrow Gauge Railroad Company under and pursuant to and in strict accordance with all the terms, conditions and provisions of the act of the legislature of the Territory of Arizona, approved February 21, 1883, en-
94 titled: "An act to promote the construction of a certain railroad;" and that the said bonds of Pima county were exchanged as aforesaid in good faith in compliance with the terms of

the said act of the legislature of the Territory of Arizona, approved February 21, 1883, by which they were authorized.

The petitioners allege that the said railroad mentioned in the said petition in said subdivision of said answer was as a matter of fact constructed from the city of Tucson in said county northerly to a point at or near the northern boundary line of said county, and the same was operated by the said company.

Said petitioners allege that the said county of Pima was and is the owner of the first-mortgage bonds of the said railroad company, which was a valid and existing first lien upon the railway constructed as aforesaid and the equipment thereof, and that it was in the power of said county of Pima to enforce its said lien by a foreclosure thereof, if there had been a failure to perform the conditions upon which said bonds were issued, to pay the interest specified in said bonds, and to operate said railroad and preserve and maintain the said property so mortgaged from waste and destruction; and instead of that the said county of Pima repudiated all responsibility thereunder; allowed the said railroad to go out of use and to be wasted; caused the same to be taxed upon a very heavy
95 assessment, to wit, — thousand dollars, and caused the said property to be sold for such tax, and said county received the proceeds of such sale, and permitted the purchasers of the railroad and equipment under such tax sale to take it up, remove and sell and hawk it about as junk and utterly destroyed; by reason whereof it permitted the security which was held to become valueless.

Said petitioners allege that the holders of the bonds mentioned in the petition had no lien upon the said railroad; had no control over said railroad corporation; had no means of enforcing any lien thereon; that the bonds held by them were simply the bonds of the county, and the holders of said bonds are in no way responsible, directly or indirectly, for any of the acts and neglects of the county hereinabove mentioned.

The petitioners allege that the said bonds in the petition mentioned after they had been delivered to the said railroad company were sold by the railroad company in public market; that they were sold upon the representation of the then members of the board of supervisors and the then treasurer of said county, and upon the recommendation and assurance of the leading business men of Pima county that the said bonds were valid, binding negotiable obligations of the county, and that the county was amply able and were willing and anxious to pay the same, and upon such representations so made the said bonds were sold at an adequate value and went
96 into the market to be exchanged from hand to hand by purchase by the bearer, and without endorsement, and, like other commercial paper, to be transferred by delivery only, and that the purchasers of said bonds bought the same in good faith and paid full value therefor in cash; and the proceeds of said Pima County bonds were used by said railroad company in the construction of the railroad to Tucson, northerly as aforesaid, or in payment of obligations and debts incurred in such construction, and a large part of the

same was paid to residents of and citizens of the said county of Pima, all of which was done with the full knowledge and approval of the board of supervisors of said county. The said petitioners purchased the said Pima County bonds in good faith and without any knowledge or notice of any kind of any fact or circumstance alleged in the said answer of defendants which they the defendants maintain or allege rendered or tended to render the said bonds illegal; and that the prior holders of said bonds likewise purchased the same in good faith and for full value and without any knowledge or notice of any such fact or circumstance.

The foregoing allegations are hereby made in reply to each and every of the subdivisions of said answer as fully and particularly as though each subdivision of said answer was specifically designated and all of said foregoing allegations specifically re-
97 peated as to each subdivision of said answer.

II.

The said petitioners allege that the said subdivision II does not state facts sufficient to constitute any defense to said petition, and offers no reason why the prayer of the petition should not be granted, and the defense therein set up has been fully adjudicated in the Supreme Court of the United States in this case, and should not now be heard and considered, and the filing of the same is in contempt of the mandate of said court. and for answer to the said subdivision petitioners deny each and every of the material allegations thereof.

III.

As to the subdivision III of said answer, the petitioners aver that the same does not state facts sufficient to constitute any defense, and shows no reason why the prayer of the petition should not be granted, and for answer thereto petitioners say that the issues therein presented have been decided by the supreme court of this Territory to constitute no defense whatever in this case, and to reassert the same is in contempt of the mandate of the supreme court.

IV.

As to subdivision IV of said answer, petitioners assert and allege the same as to the third subdivision, and for answer thereto the petitioners allege that they acquired the bonds specified and
98 set forth in the petition in good faith and for full value and in open market, and that the same had long before that time been sold and exchanged in good faith and in compliance with the act of legislature by which they were authorized, as heretofore and herein alleged by the exchange of the first-mortgage bonds of said railroad company for the said bonds specified in the petition herein, and the said bonds were sold and exchanged in good faith to innocent purchasers thereof in open market, and by divers and sundry transfers and sales they became the property of the petitioners.

V.

With reference to subdivision V of the said answer, petitioners defend and say that the same does not state facts sufficient to constitute any defense to said action or show any reason why the prayer of the petition should not be granted, and for answer thereto said petitioners disclaim and deny that any memorial to Congress is any part of this legislation and has any binding force or effect upon the laws which may be passed by Congress, and they allege that the said memorial by its terms and by fair construction thereof upon its face includes the advice and request of the said legislature of the Territory of Arizona to validate the said bonds specified in the petition; but whether the same does or not the act itself of Congress validates them, and that being true, the said memorial can have no force or effect whatever.

And the said petitioners allege that the said bonds and coupons are and were the outstanding bonds of Pima county, sold
99 and exchanged in accordance with the law, and the validity thereof has been made clear and certain by the act of Congress, which has removed all doubt which may have existed heretofore as to their validity.

VI.

As to the statute of limitations asserted in subdivision VI of said answer, petitioners allege that the cause of action began and accrued on the 6th day of June, 1896, and that the statute of limitations commenced to run from that date, and not before, and the time in which an action could be brought thereon has not yet expired, and hence petitioners allege that the said subdivision does not state facts sufficient to constitute any defense to said cause, or any reason why the prayer of the petition should not be granted.

VII.

As to subdivision VII of said answer, the petitioners defend and say that the same does not state facts sufficient to constitute any defense, and shows no reason why the prayer of the petition should not be granted, and for answer thereto the petitioners allege that by the decision of the Supreme Court in this case it was decided that this suit is against the Loan Commissioners of the Territory of Arizona, whoever the individuals may be, and that this court has been directed by a mandate of that court to take such steps as may be necessary, and such action as may be required in accordance
100 with the opinion and decision of the Supreme Court of the United States, and hence petitioners allege that this court in obedience thereto, and in pursuance thereof, must disregard the said subdivision VII of said answer, and petitioners ask that the same be stricken out or utterly disregarded by this court.

And the petitioners allege that if it be true, as stated, that the said Franklin has departed this life, the attorneys who signed said answer have no right or authority to appear for him, and the petitioners requests and asks the court that a rule be entered against the

attorneys who have filed the answer to this case and entered the appearance, and to show by such appearance for whom they appear in this case and for whom and on behalf of whom this answer is filed, and whom they represent in filing the same.

VIII.

As to subdivision VIII of said answer, the petitioners deny the allegations of said answer that the said legislature of the Territory of Arizona repealed the loan commission of Arizona, and that the loan commission no longer exists; and petitioners allege that the legislature of the Territory of Arizona had no power to repeal the same, and that any attempt to do so is void and of no force and effect.

IX.

As to subdivision IX of said answer, petitioners allege that
101 the holders of said bonds alleged in such petition had and have the right by law to have their bonds funded in accordance with the acts of Congress and the acts of the legislature of the Territory of Arizona whether it be the wish of the county of Pima to have the same funded or not, and for further answer to the said subdivision IX of said answer, petitioners state that the county of Pima is not a party to this suit; the answer is not filed for or on behalf of said county upon its face, and the allegations as to the wishes of the county of Pima can have no weight or consideration in this court.

X.

As to subdivision X of said answer, the petitioners state that the same does not state facts sufficient to constitute a defense to said action, nor does it offer a reason why the said prayer of the petition should not be granted; and in answer thereto petitioners deny specifically the allegations that the bonds owned by petitioners were not sold or exchanged in good faith, in accordance with the laws of the Territory, and they assert and allege that the said bonds were sold and exchanged in good faith, in accordance with the act of the legislature of the Territory of Arizona under which they were issued, and the same were sold to purchasers in good faith and for valuable consideration in open market, and that they became the property of petitioners by purchase and for valuable consid-
102 eration before the said bonds were due, and hence they allege that the same are valid outstanding bonds of the county, and that the holders thereof have the right to have them funded according to the laws of Congress and the laws of the Territory of Arizona, and to have the petition in this case granted and allowed by this court.

XI.

As to subdivisions XI, XII, XIII, XIV of said answer, petitioners deny that said railroad company was insolvent as alleged; deny that the said company never built and that it never operated any part

of the railroad to be built according to its said articles of incorporation, or any railroad whatever; and deny that immediately after it came into possession of the bonds of Pima county it ceased all appearance of business and pretense of doing business, and deny that the said bonds of the said railroad company have at all times been worthless; and with reference thereto the petitioners have heretofore fully answered, and as to the facts upon which the same were issued, in the subdivision of this reply.

And said petitioners further deny the fourteenth subdivision of said answer, and reassert with reference thereto the allegations of subdivision — of this reply.

XVI.

With reference to subdivision XVI of said answer, petitioners deny that the statute of limitations has run against any of the coupons of said bonds, and the same became validated by act of Congress of June 6, 1896, and that the time for commencing the action thereon has not yet expired.

XVII.

As to paragraph XVII of said answer, petitioners allege that the same does not state facts sufficient to constitute a cause of action or to make a claim or set-off in said cause, and further, that there can be no claim or set-off made in a suit of this kind, which is a suit for a mandamus, and that no set-off can be made as against petitioners, the *bona fide* holders of said negotiable Pima County bonds; and again, that the loan commissioners of Arizona can have no claim or set-off with reference thereto, as the said Narrow Gauge bonds are not bonds which are owned by said loan commissioners of the Territory of Arizona, but are the property of the county of Pima, and the county of Pima is not a party to this suit.

Wherefore, the petitioners pray that the prayer of the petition be granted, and that the answer therein be disregarded, and for such other and further relief as the law or equity affords.

BARNES & MARTIN &
DILLON & HUBBARD,
Att'ys for Petitioners.

TERRITORY OF ARIZONA, }
County of Maricopa. }

William H. Barnes being duly sworn on oath states that he is the agent of petitioners in this behalf. He states that the facts alleged in foregoing reply in denying allegations of answer are true in substance & in fact, and as to other matters he believes them to be true.

WILLIAM H. BARNES.

Subscribed and sworn to before me this first day of November A. D., 1899.

LLOYD JOHNSTON,
Clerk Supreme Court of Arizona,
[SEAL.] By ANGIE B. PARKER, *Deputy.*

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter *et al. vs.* B. J. Franklin *et al.* Reply of petitioners. Filed Nov. 1st, 1899. Lloyd Johnston, clerk. By Angie B. Parker, deputy.

105 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA.

Be it remembered that this cause came on to be heard on the first day of November, A. D. 1899, and the motion of the petitioners heretofore filed to strike from the files the so-called amended return filed in said court on the 1st day of June A. D., 1899, and the same having been heretofore submitted to the court, a copy of which said motion is hereto attached and made a part hereof, was decided by the court and the said motion was denied and the said so-called first amended return was by the court ordered to be permitted to remain in the record and to stand as a return to the petition herein and to said rulings and decision of the court the petitioners then and there excepted, and, inasmuch as the matters herein are not a part of the record or judgment-roll in said cause this bill of exceptions is hereby signed and is hereby ordered to be made part of the judgment-roll and the record in this cause.

Done this first day of November, A. D. 1899, by the court.

RICHARD E. SLOAN,
Associate Justice.

106 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA.

And now comes the petitioners by Barnes & Martin, their attorneys, and move the court to strike from the files the so-styled first amended return herein for the following reasons, namely:

1. The same was filed without leave of the court.

2. By the decision mandate and opinion of the Supreme Court of the United States in this case no new defenses or new "returns" can be considered by this court.

3. This court in obedience to the mandate opinion and decision of the Supreme Court of the United States has no power to do other than direct the issuance of the writ of mandamus as prayed for in the petition herein and execute the decision of the Supreme Court of the United States by ordering a proper writ in accordance with the issues heretofore herein — and decided.

By BARNES & MARTIN,
Attorneys for Plaintiffs.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. Jas. L. Utter, *et al.*, *vs.* B. J. Franklin, *et al.* Bill of exceptions. Filed Nov. 1st, 1899, Lloyd Johnston, clerk. By Angie B. Parker, deputy.

107 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER and THE EXECUTORS OF THE ESTATE OF ELIZABETH B. VOORHIES, Petitioners,
against
LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

I.

Come now the petitioners, and not in any — waiving their motion to dismiss and strike out the answer attempted to be filed in this case for the reason that the same was filed without leave of the court, and after a trial had been had in said cause, and for the further reason that judgment had been rendered in said cause, and for the further reason that the filing of the same disregards the decision and mandate of the Supreme Court of the United States, reasserts the same defenses which were asserted in the cause before the appeal to that court, and is in contempt of its mandate, by this amended reply, the same having first been served on attorneys for respondents come and defend against the said answer as follows, to wit:

II.

That the first subdivision of the said answer does not
108 state facts sufficient to show any reason why the prayer of the petition should be granted, and for reply thereto and to each and all the subdivisions of said answer, the petitioners defend and deny all the material allegations of said subdivisions, and allege that the said bonds were delivered to the railroad company in the said subdivisions mentioned, with the full knowledge, direction, approval and consent of the board of supervisors of the said county of Pima, and they allege that after said bonds were so delivered said board of supervisors ratified and confirmed the delivery of the same, recognized the same as valid by paying interest coupons thereon, and they also acknowledged, ratified and confirmed the said delivery by exchanging the coupons of the bonds of said railroad company described in said subdivisions for the interterest coupons of the said bonds of Pima county which had before that time been delivered.

And said petitioners allege that the said bonds of Pima county described in the petition were delivered to the railroad company therein described in exchange for the first-mortgage bonds of said railroad company of a like amount, drawing the same rate of interest. The said bonds of said railroad company were delivered to and received and accepted by said county of Pima, and they have remained in the treasury of said county ever since, and are now in

the treasury of the county and the property of the county.
109 That said bonds of Pima county were made, executed, issued and delivered to the said Arizona Narrow Guage Railway Company under and pursuant to and in strict accordance with all the terms, conditions and provisions of the act of the legislature of the Territory of Arizona approved February 21st, 1883, entitled "An act to promote the construction of a certain railroad;" and that the said bonds of Pima county were exchanged as aforesaid in good faith in compliance with the terms of the said act of the legislature of the Territory of Arizona, approved February 21st, 1883, by which they were authorized.

The petitioners allege that said railroad mentioned in said petition in said subdivision of said answer was as a matter of fact constructed from the city of Tucson in said county northerly ten miles and to a point at or near the northern boundary line of said county, and the same was operated by said company.

Said petitioners allege that the said county of Pima was and is the owner of the first-mortgage bonds of said railroad company, which was a valid and existing first lein upon the railway constructed as aforesaid and the equipment thereof, and that it was in the power of said county of Pima to enforce its said lien by a foreclosure thereof, if there has been a failure to perform the condition upon which said bonds were issued, to pay the interest specified in said bonds, and operate said railroad and preserve and maintain the said prop-
110 erty so mortgaged from waste and destruction; and instead of that the said county of Pima repudiated all responsibility thereunder; allowed the said railroad to go out of use and to be wasted; caused the same to be taxed under a very heavy assessment, to wit: —— thousand dollars, and caused said property to be sold for such tax, and said county received the proceeds of such sale, and permitted the purchasers of the railroad and equipment under such tax sale to take it up, remove and sell and hawk it about as junk and utterly destroyed; by reason whereof it permitted the security which was held to become valueless.

Said petitioners allege that the holders of the bonds mentioned in the petition had no lein on said railroad; had no control over said railroad corporation; had no means of enforcing any lien thereon; that the bonds held by them were simply the bonds of the county and the holders of said bonds are in no way responsible, directly or indirectly, for any of the acts and neglects of the county hereinabove mentioned.

All of which fully appears in the minutes of said board at the dates hereinafter named and in the words and figures following, viz:

April 27th, 1883.

OFFICE OF THE BOARD OF SUPERVISORS,
PIMA COUNTY, ARIZONA.

To M. G. Samaneigo and A. D. Otis, members of the board of
111 supervisors of Pima county, A. T.:

GENTLEMEN: You will please take notice that W. H. Culver, president of the Narrow Guage Railroad Company, has this day filed in the office of the board a notice that said railroad company is ready to exchange bonds with the county of Pima, according to the provisions of an act of the Legislative Assembly of the Territory of Arizona, approved March 6th, 1883; entitled An act to provide for the construction of a certain railroad, and that in accordance with the provisions of section one of said act enjoining upon me the duty of calling a meeting of the board of supervisors to be held within five days after the receipt of said notification, there will be a meeting of the board at their office in the county court-house on Monday, the 30th day of April, A. D. 1883, at 10 o'clock a. m. to take action on said notice and application.

(Signed) JAMES H. TOOLE, *Chairman.*

April 30th, 1883.

The board of supervisors met pursuant to call of the chairman issued April 27th, under the provision of section one of the act of the Legislative Assembly of the Territory of Arizona, approved February 21st, 1883, entitled "An act to provide for the construction of a certain railroad," to consider the appiication of W. H. Culver, president of the Arizona Narrow Gauge Railroad Company,
112 for an exchange of bonds in accordance with the provisions of said act.

May 1st, 1883.

This being the day and hour set pursuant to adjournment from yesterday's session for the hearing of the application — Narrow Guage Railroad Company for exchange of bonds in accordance with the provisions of an act of the Legislative Assembly of the Territory of Arizona, approved February 21st, 1883, entitled An act to provide for the construction of a certain railroad; and W. H. Culver and H. Farley, Esq., president and secretary respectively of said railroad company being present and presenting reasons and arguments in favor of the exchange of bonds. Ordered that the matter be taken under advisement.

May 4th, 1883.

The board again took under consideration the matter of the application of the Narrow Guage railroad for an exchange of $200,000 in bonds with Pima county.

After arguments being heard for and against the proposition, the matter was taken under advisement until May 5th, at 10 o'clock a. m.

May 5th, 1883.

The board resumed the consideration of the application of the Narrow Guage Railroad Company for an exchange of bonds.

After argument for and against the proposition, Supervisor Toole offered the following:

Ordered, that the board having duly considered the appli-
113 cation of the Narrow Guage Railroad Company for an exchange of $200,000 bonds and being of the opinion that the said railroad company is not in a position to give any guarantee that they intend in good faith, to build said road, it is ordered, that until said company do some act in accordance with the provisions of the law under which they ask an exchange of bonds, their application be refused and denied.

The motion not being seconded was not entertained.

Supervisor Samaneigo presented for the consideration of the board the following order:

Ordered, that $200,000 of the bonds of the county of Pima drawn in accordance with an act of the Legislative Assembly of the Territory of Arizona, entitled "An act to promote the construction of a certain railroad," approved the 21st day of February, A. D. 1883, be issued, and that the same be placed in the hands of the county treasurer upon the Arizona Narrow Guage Railroad Company giving bonds to the county of Pima in the sum of five hundred dollars, conditioned, that if the above bonds are not exchanged in accordance with the provisions of said act for the bonds of the above-named railroad, that said company will repay the said county of Pima all the expense incurred in issuance of said bonds; the bond to be approved by the board after submission to the district attorney as to form.

The question being on the adoption of the order those voting in the affirmative were Supervisors Otis and Samaneigo, those
114 voting in the negative were Supervisor Toole, so the motion — passed and adopted.

May 19th, 1883.

Ordered, that the clerk be instructed to prepare forms of bonds to be issued ready for the inspection of the board May 21st, 1883, at 10 o'clock a. m.

May 21st, 1883.

The clerk submitted forms of bonds to be issued under law of February 21st, and May 6th, and being examined, ordered that they be sent to A. L. Bancroft & Co. for lithographing.

August 2nd, 1883.

In the matter of the exchange of bonds with the Arizona Narrow Guage Railroad Company:

Ordered, that the respective county officers, required by law so to do, sign and seal said bonds, and thereupon the clerk of the board

is hereby instructed to deliver said bonds to the county treasurer, taking his receipt therefor.

November 7th, 1884.

Ordered, all members voting "aye," that the county treasurer be instructed not to pay any interest on the bonds issued by the county to the Arizona Narrow Guage Railroad Company until he receive the further order of the board, and that the clerk transmit a copy of this order to the treasurer.

115 April 13th, 1885.

W. H. Culver appeared and asked that a copy of the opinion of the dist. att'y in regard to the Narrow Guage R. R. Comp'y be handed to the county treasurer. The board agreed to take the matter up for consideration this evening.

The opinion of the district attorney in regard to the action of the old board in making no levy for taxes to pay interest on Narrow Guage R. R. bonds was again brought up for consideration, J. C. Handy being interested in the company, retired from the board and the probate judge was summoned to act in his stead. The matter was discussed at length by Messers. H. S. Stevens, L. C. Hughes and W. H. Culver asked the board to transmit a copy of the opinion of the district attorney to the county treasurer. On motion the opinion of the district attorney was ordered on file in this office.

July 6th, 1886.

A communication was received from county treasurer, stating that he had made an exchange with the Narrow Guage R. R. Co. of the interest coupons on the bonds issued and received by virtue of act 35 of the Laws of 1883.

Also that a certain provision of said act having been complied with, he had issued and received the second paying of fifty thousand dollars worth of bonds. Communication ordered on file.

116 Quarterly report of county treasurer was presented and it appearing there was no mention made of the bonds of the Narrow Guage R. R. received and exchanged for Pima County bonds, the treasurer was instructed to make a note of that fact in the colum- of remarks.

August 9th, 1886.

Here Supervisor Handy presented the following resolution which was adopted and ordered spread upon the minutes.

Whereas the county has a large outstanding indebtedness, and whereas said indebtedness was caused by making permanent improvements in the county, the administration of justice in this frontier country, the high rate of interest paid on indebtedness, together with the depression caused by Indian raids and murders.

Resolved that the board levy the minimum rate allowed by law, with the recommendation that our representatives in the legislature

pass a law authorizing the county to fund its debts, in order that posterity may impart for advantages there received from the result of the labors of this generation.

Resolved that a copy of this resolution be forwarded to each legislator elected from this county.

September 4th, 1886.

Report of Committee.

TUCSON, A. T., *Sept. 3rd*, 1886.

Your committee of the whole respectfully report that we
117 have examined into the financial condition of the county as shown by the books and report of the treasurer.

We find that January 1st, 1885, there was $80,000 floating indebtedness.

We find that there has been created a floating indebtedness since that date of $85,000 including interest on same.

We find that there is $70,000 on court-house bonds and $150,000 on Narrow Guage Railroad bonds, making a total indebtedness of $385,000.00.

As assets to the county, we note $15,000.00 cash, in Narrow Guage Railroad bonds $150,000.00 which subtracted from the $385,000.00 liabilities leaves $220,000.00, which is substantially the indebtedness of this county.

Attention is called to the fact that — court-house and jail has been built and that the grounds around have been beautifully adorned, roads have been built and improved, all of which is for the benefit of posterity.

The $49,000.00 of the Port Lobus bonds have also been redeemed and that debt extinguished.

There is now due from the tax-payers of the county on the current year's assessment about $75,000.00, a probable delinquency of fifteen per cent. having been deducted.

We do not give this as being correct to a dollar, as the short time in which the committee has to examine the books of the office
118 is not sufficient for that purpose, but the figures are substantially correct.

The committee earnestly renews its recommendation that the indebtedness of this county be bonded at a low rate of interest, and to run for a sufficient length of time, that our successors in Pima county be enabled to pay in part for the permanent improvement they will enjoy, and that sufficient money be raised at the same time to furnish cash for the immediate payment of all warrants issued until the first taxes are paid into the treasury.

In conclusion we herewith furnish you with the figures as furnished by the county treasurer.

(Signed) R. R. RICHARDSON,
Chairman of Committee.

Report of County Treasurer.

Financial standing and outlook of Pima county, Arizona.

September 1st, 1886.

TUCSON, *September 3rd*, 1886.

To the honorable board of supervisors, Pima county, Arizona.

GENTLEMEN: In accordance with instructions, I hereby submit a rough tho', I think, quite accurate statement of the conditions of this county.

DR.

Bonded Indebtedness.

Court-house bonds	$70,000.00
N. G. Railroad bonds	150,000.00

119 *Floating Indebtedness.*

General fund warrants	General, contingent, & road fund.	
Contingent fund warrants	Warrants and accrued interest.	
Road fund warrants and accrued interest.	$80,000 of this am't & int. accrued that were drawn by the former board of supervisors.	165,000.00
Total		$385,000.00

CR.

N. G. Railroad bonds	$150,000.00
Surplus in the treasury	15,000.00
Total	$165,000.00
Actual indebtedness of Pima county on September 1st, 1886	220,000.00

The estimated floating indebtedness of Pima county on January 1st, 1885, when the present board took their seats was about $135,000,00.

The present floating indebtedness as estimated in the foregoing statement is about $165,000.00.

A very good showing when the following facts are taken into account.

1st. There will be at least $25,000.00 worth more of warrants to redeem during the next four months, than will be issued.

2nd. And this consideration should probably come first. All

the warrants drawn for this year, at any rate, were based,
120 as they should be, on returns from the tax-roll of 1886, a most legitimate asset of this county at the present moment.

3rd. The present board has been compelled by law to transfer over $20,000.00 from the general fund for the payment of the county officials, their fees being so much short of the salaries provided by law.

The standing of the county so far as its floating indebtedness is concerned, and that is what the board of supervisors are accountable for, may now be easily foreseen for the 1st of Jan. 1887, the date of the expiration of the term of the present board of supervisors.

Respectfully submitted,

(Signed) THOMAS HUGHES, *Treasurer.*
Per HENEY, *Deputy.*

Nov. 15th, 1886.

Mr. Flagstaff and Mr. Walker of the Narrow *Guage* R. R. Co. appeared before the board on matters concerning the future construction of the road, and as J. C. Handy, a member of the board, was an interested party and R. R. Richardson was absent, it was decided to postpone any matter they may haye to submit until such time as a full board was present.

December 16th, 1886.

Matters pertaining to the Narrow *Guage* R'road Company having come up, making inquiry as to the non-publication by the
121 treasurer, as heretofore ordered by the board, of the advertisement for the sale of the Narrow *Guage* Railroad bonds.

Supervisors J. C. Handy, being an interested party retired from the board, Probate Judge J. S. Wood taking his place according to law.

The treasurer being present stated, that as he was not directed as to the special time of publication, he had given the matter his attention and had sought legal advise as to his duty in the premises.

On motion the clerk was instructed to notify the treasurer to have advertisement published forthwith, and at the lowest market price.

December 22nd, 1886.

Matters pertaining to the Narrow *Guage* railroad coming before the board, and Supervisors Handy being an interested party withdrew from the board and Probate Judge, J. S. Wood entered and took his seat according to law.

Petitions were then presented to the board by Judge W. H. Culver, largely signed by the tax-payers of the county, asking to have the bonds of said railroad company which the county now holds or may become entitled — offered for sale in the manner prescribed by law, and in order to encourage the speedy building of said railroad to the San Pedro valley, that the board accept any bid of said company on the basis of twenty-five cents on the dollar for said bonds

with coupons attached, payable in cash or Pima County
122 bonds at par, at the option of said company—provided that said bonds are not to be delivered nor payment required until sixty miles of said road is in operation and the majority of the Globe trade is turned over said railroad to Tucson,—and provided further that said sixty miles of road shall be completed and the said Globe trade shall be so turned within eighteen months from the first of January next.

On motion it was ordered that the clerk of this board issue an order to the county treasurer to forthwith advertise said Narrow *Guage* Railroad bonds for sale, in compliance with chapter 9, section 225, page 68 of the Compiled Laws.

December 31st, 1886.

Matters pertaining to the Narrow *Guage* Railroad Company coming before the board and Supervisor Handy being an interested party withdrew from the board and Probate Judge J. S. Wood entered and took his seat according to law.

Chairman Mansfeld reported that county treasurer has peremptorily refused to advertise for sale *of* the Narrow *Guage* Railroad bonds and calls attention of the new board to that fact.

January 4th, 1887.

Whereas, certain proceedings having been had by the board of supervisors of this county on the 30th day of November, 1886; in which the county treasurer of Pima county was directed to advertise for bids of bonds of the Arizona Narrow *Guage* R. R. Co.
123 and it appearing that the late county treasurer refused, or neglected to make such publication as required by law.

It is ordered, that the county treasurer of Pima county be and he is hereby directed to make such publication of notice for the space of four weeks, for sealed proposals for the purchase of all the bonds of the Arizona Narrow *Guage* R. R. Co., now in the hands of said Pima county, or to come into their hands, the same to be advertised in a newspaper published in said county for the period of four weeks.

February 15th, 1887.

Now comes John S. Wood, county treasurer of Pima county and asks the board to specify the amount of Narrow *Guage* railroad bonds that he shall sell under the bid made and filed with him for the sale of such bonds, and the board, in their judgment, believing that it will be for the best interests of all parties concerned, it is resolved, that said John S. Wood, county treasurer, be and he is hereby advised to accept the bid of said Narrow *Guage* R. R. Co. for all of the bonds of said company now in his hands, or that may hereafter come into his hands, to be done in full conformity with the bid of said company now on file in his office, a copy of which is on file with this board.

February 17th, 1887.

The matter of the sale of the Arizona Narrow *Guage* R. R. bonds now in the hands of the county treasurer of this county
124 or that may hereafter come into his hands, coming on regularly to be heard, and it appearing that John S. Wood, county treasurer has made publication of notice of such sale according to law; that said Arizona Narrow *Guage* Railroad Company were the only bidders for said bonds, and that their bid for said bonds is for twenty-five cents on the face value of said bonds (without interest) payable in the county bonds of Pima county at their face value (without interest) and a contract or agreement for the sale and surrender of said bonds and for the payment therefore having been this day made, executed and signed in triplicate by this board of supervisors and John S. Wood, county treasurer, on behalf of Pima county, and by the Arizona Narrow *Guage* Railroad Company, by their president and secretary and W. W. Walker, contractor on behalf of said Arizona Narrow *Guage* Railroad Company, fully covering the conditions of said sale and payment for said bonds, one copy of which said contract or agreement is on file with this board.

It is ordered, that sale of said bonds as provided in said bid and contract or agreement be and the same is hereby confirmed and approved, and

It is further resolved, that the chairman and clerk of this board are hereby authorized to officially sign and execute said contract or agreement and that said agreement or contract is hereby confirmed and approved.

125 July 1st, 1887.

The territorial board of equalization having reported to this board the length of the main track and the assessed value of the Southern Pacific Railroad Company in the county, and the length of the main track and the value of the New Mexico and Arizona Railroad Company in this county, and the length of the main track and assessed value of the Arizona Narrow *Guage* Railroad Company in this county, which appears the following to wit:

The Southern Pacific Railway Company main track in Pima county 63.25 miles with assessed valuation of same including *pro rata* of the rolling stock, real estate and improvements on right of way $638,989.39.

The New Mexico and Arizona Railroad Company in this county, main track 52.40 miles with valuation of same including *pro rata* of the rolling stock, real estate and improvements on right of way $317,081.43.

The Arizona Narrow *Guage* Railroad Company in this county, 9 miles and rolling stock $37,000.00 with an additional 30 % thereon assessed by the said board for non-return making a total of $48,100.00 assessed to said railroad company.

It is ordered, that the county assessor of Pima county enter said statement upon the assessment-roll of said county with the descrip-

tion under their proper heads and the total assessment properly carried out.

And the clerk of said board is hereby ordered to further
126 the county assessor with a certified copy of the detailed statement of the said territorial board of equalization with a certified copy of this order.

July 6th, 1888.

The territorial board of equalization having report- to this board the length of the main track and the assessed value of the Southern Pacific Railroad Company in this county, and the length of the main track and the assessed value of the New Mexico Railroad Company in this county, and the length of the main track and the assessed value of the Arizona Narrow Guage Railroad Company in this county, which appears as follows, to wit:

The Southern Pacific Railroad Company, 63.25 miles, with the assessed valuation of same, including the *pro rata* of the rolling stock, real estate and improvements on right of way, $506,000.

The New Mexico and Arizona Railroad Company in this county, main track 52.4 miles, with valuation of same, including *pro rata* of the rolling stock, real estate and improvements on right of way, $330,190.84.

The Arizona Narrow Guage Railroad Company in this county is 10 miles and rolling stock $40,000 with additional 30 % thereon assessed by said board for non-return, making $52,000 as the total assessment of said railroad company.

On motion, all members present voting "aye," it is ordered
127 that the county assessor of Pima county enter said statement upon the assessment-roll of said county for the year 1888, with the description under their proper heads and the total assessment properly carried out, and the clerk of this board is hereby ordered to furnish the county assessor with a certified copy of the detailed statement of said territorial board of equalization and also with a certified copy of this order.

The foregoing being copies from the minutes of said board and all the proceedings of said board are included in the same.

The petitioners allege that the said bonds, in the petition mentioned, after they had been delivered to the said railroad company, were sold by the railroad company in public market; that they were sold upon the representation of the then members of the board of supervisors and the then treasurer of said county, and upon the recommendation and assurance of the leading business men of Pima county that the said bonds were valid, binding negotiable obligations of the county, and that the county was amply able and *were* willing and anxious to pay the same, and upon such representations, so made, the said bonds were sold at an adequate value, and went into the market to be exchanged from hand to hand by purchase by the bearer, and without endorsements, and, like other commercial paper, to be transferred by delivery only, and that the purchasers of

said bonds bought the same in good faith and paid the full value
128 therefor in cash; and the proceeds of said Pima County bonds were used by said railroad company in the construction of the railroad to Tucson, northerly as aforesaid, or in payment of obligations and debts incurred in such construction, and a large part of the same was paid to residents of and citizens of the said county of Pima, all of which was done with the full knowledge and approval of the board of supervisors of said county. The said petitioners purchased the said Pima County bonds in good faith and without any knowledge or notice of any kind of any fact or circumstances alleged in the said answer of defendants which they the defendants maintain or allege rendered or tended to render the said bonds illegal; and that the prior holders of said bonds likewise purchased the same in good faith and for full value and without any knowledge or notice of any such fact or circumstance.

The foregoing allegations are hereby made in reply to each and every of the subdivisions of said answer as fully and particularly as though each subdivision of said answer was specifically designated and all of said foregoing allegations specifically repeated as to each subdivision of said answer.

III.

That said petitioners allege that the said subdivision II does not state facts sufficient to constitute any defense to said petition, and offers no reason why the prayer of the petition should not be
129 granted, and the defense therein set up has been fully adjudicated in the Supreme Court of the United States in this case, and should not now be heard and considered, and the filing of the same is in contempt of the mandate of said court, and for answer to the said subdivision petitioners deny each and every of the material allegations thereof.

IV.

As to the subdivision III of said answer, the petitioners aver that the same does not state facts sufficient to constitute any defense, and shows no reason why the prayer of the petition should not be granted, and for answer thereto petitioner- say that the issues therein presented have been decided by the supreme court of this Territory to constitute no defense whatever in this case, and to reassert the same is in contempt of the mandate of the Supreme Court.

V.

As to subdivision IV of said answer, petitioners assert and allege the same as to the third subdivision, and for answer thereto the petitioners allege that they acquired the bonds specified and set forth in the petition in good faith and for full value and in open market, and that the same had long before that time been sold and exchanged in good faith and in compliance with the act of legislature by which they were authorized, as heretofore and herein alleged by the exchange of the first-mortgage bonds of said railroad company

for the said bonds specified in the petition herein, and the
130 said bonds were sold and exchanged in good faith to innocent purchasers thereof in open market, and by divers and sundry transfers and sales they became the property of the petitioners.

VI.

With reference to subdivision V of the said answer, petitioners defend and say that the same does not state facts sufficient to constitute any defense to said action or show any reason why the prayer of the petition should not be granted, and for answer thereto said petitioners disclaim and deny that any memorial to Congress is any part of this legislation and has any binding force or effect upon the laws which may be passed by Congress, and they allege that the said memorial by its terms and by fair construction thereof upon its face includes the advise and request of the said legislature of the Territory of Arizona to validate the said bonds specified in the petition; but whether the same does or not the act itself of Congress validates them, and that being true, the said memorial can have no force or effect whatever.

And the said petitioners allege that the said bonds and coupons are and were the outstanding bonds of Pima county, sold and exchanged in accordance with the laws, and the validity thereof has been made clear and certain by the act of Congress, which has removed all doubt which may have existed heretofore as to their validity.

131 VII.

As to the statute of limitations asserted in subdivision VI of said answer, petitioners allege that the cause of action begun and accrued on the 6th day of June, 1896, and that the statute of limitations commenced to run from that date, and not before, and the time in which an action could be brought therefor has not yet expired, and hence petitioners allege that the said subdivision does not state facts sufficient to constitute any defense to said cause, or any reason why the prayer of the petition should not be granted.

VIII.

As to subdivision VII of said answer, the petitioners defend and say that the same does not state facts sufficient to constitute any defense, and shows no reason why the prayer of the petition should not be granted, and for answer thereto the petitioners allege that by the decision of the Supreme Court in this case it was decided that this suit is against the Loan Commissioners of the Territory of Arizona, whoever the individual may be, and that this court has been directed by a mandate of that court to take such steps as may be necessary, and such action as may be required in accordance with the opinion and decision of the Supreme Court of the United States, and hence petitioners allege that this court in obedience thereto, and in pursuance thereof, must disregard the said subdivision VII
132 of said answer, and petitioners ask that the same be stricken out and utterly disregarded by this court.

And the petitioners allege that if it be true, as stated, that the said Franklin has departed this life, the attorneys who signed said answer have no right or authority to appear for him, and the petitioners request and asks the court that a rule be entered against the attorneys who have filed the answer to this case and entered the appearance, and to show by such appearance for whom they appear in this case and for whom and on behalf of whom this answer is filed, and whom they represent in filing the same.

IX.

As to subdivision VIII of said answer, the petitioners deny the allegations of said answer that the said legislature of the Territory of Arizona repealed the loan commission of Arizona, and that the loan commission no longer exists; and petitioners allege that the legislature of the Territory of Arizona had no power to repeal the same, and that any attempt to do so is void and of no force and effect.

X.

As to subdivision IX of said answer, petitioners allege that the holders of said bonds alleged in such petition had and have the right by law to have their bonds funded in accordance with the acts of Congress and the acts of the legislature of the Territory of Arizona, whether it be the wish of the county of Pima to have the same funded or not, and for further answer to the said subdivision
133 IX of said answer, petitioners state that the county of Pima is not a party to this suit; the answer is not filed for or on behalf of said county upon its face, and the allegations as to the wishes of the county of Pima can have no weight or consideration in this court.

XI.

As to subdivision X of said answer, the petitioners state that the same does not state facts sufficient to constitute a defense to said action, nor does it offer a reason why the said prayer of the petition should not be granted; and in answer thereto petitioners deny specifically the allegations that the bonds owned by the petitioners were not sold or exchanged in good faith, in accordance with the laws of the Territory, and they assert and allege that the said bonds were sold and exchanged in good faith, in accordance with the act of the legislature of the Territory of Arizona under which they were issued, and the same were sold to purchasers in good faith and for valuable consideration in open market, and that they became the property of the petitioners by purchase and for valuable consideration before the said bonds were due, and hence they allege that the same are valid outstanding bonds of the county, and that the holders thereof have the right to have them funded according to the laws of Congress and the laws of the Territory of Arizona, and to have the petition in this case granted and allowed by this court.

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XII.

As to subdivisions XI, XII, XIII, XIV of said answer, petitioners deny that said railroad company was insolvent as alleged; deny that the said company never built and that it never operated any part of the railroad to be built according to its said articles of incorporation, or any railroad whatever; and deny that immediately after it came into possession of the bonds of Pima county it ceased all appearance of business and pretense of doing business, and deny that the said bonds of the said railroad company have at all times been worthless; and with reference thereto the petitioners have heretofore fully answered, and as to the facts upon which the same were issued, in II subdivision of this reply.

And said petitioners further deny the fourteenth subdivision of said answer, and reassert with reference thereto the allegations of subdivision II of this reply.

XIII.

With reference to subdivision XVI of said answer, petitioners deny that the statute of limitations has run against any of the coupons of said bonds, and the same became validated by act of Congress of June 6, 1896, and that time for commencing the action thereon has not yet expired.

XIV.

As to paragraph XVII of said answer, petitioners allege that the same does not state facts sufficient to constitute a cause of
135 action or to make a claim or set-off in said cause, and further, that there can be no claim or set-off made in a suit of this kind, which is a suit for a mandamus, and that no set-off can be made as against petitioners, the *bona fide* holders of said negotiable Pima County bonds; and again, that the loan commissioners of Arizona can have no claim or set-off with reference thereto, as the said Narrow Guage bonds are not bonds which are owned by said loan commissioners of the Territory of Arizona, but are the property of the county of Pima, and the county of Pima is not a party to this suit.

Wherefore, the petitioners pray that the prayer of the petition be granted, and that the answer therein be disregarded, and for such other and further relief as the law or equity affords.

BARNES & MARTIN,
DILLON & HUBBARD,
Att'ys for Petitioners.

136 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER and THE EXECUTORS OF THE ESTATE OF ELIZABETH B. VOORHIES, Petitioner-,
against
LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

TERRITORY OF ARIZONA, *County of Pima*, } ss:

William H. Barnes being first duly sworn on oath states that he is the agent of the petitioners in this behalf and that the facts alleged in the foregoing reply are true in substance and in fact.

Subscribed and sworn to this 10th day of November, 1899.

WILLIAM H. BARNES.

Subscribed & sworn to before me this 10th day of November 1899.

JOHN H. MARTIN,
[SEAL.] *Notary Public.*

Commission expires March 31, 1903.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. Utter, *et als. vs.* Loan Commissioners of Arizona. Amended reply. Service by copy admitted this 10th day of November, 1899. C. W. Wright, attorney for respondents. Filed Nov. 11th, 1899. Lloyd Johnston, clerk. By Angie B. Parker, deputy.

137 In the Supreme Court of the Territory of Arizona, January Term, 1900.

UTTER ET AL.
vs.
FRANKLIN ET AL.

Come now the respondents herein by C. W. Wright and Rochester Ford, of counsel, and not waiving their motion to have this case dismissed on the ground that there are no loan commissioners of the Territory of Arizona, move the court, if the court takes jurisdiction of this case, to order the questions of fact to be tried before a jury and to postpone the argument until such trial can be had and the verdict certified to this court, and respondents further move the court to designate Pima county as the county in which the said questions of fact shall be tried, if they are tried at all. And in support of this motion, respondents represent to the court that, as shown by the pleadings herein, the records of the board of supervisors of Pima county, on which records both of the parties hereto rely, are in the said Pima county, and cannot be removed, and that all the witnesses in this case who reside in the Territory of Arizona reside in said Pima county, and that counsel in the case also reside in said Pima county; and that it will be for the aforesaid reasons more convenient and

expeditious to try the said case in Pima county rather than in
138 any other county of the Territory of Arizona.

Respectfully submitted.

C. W. WRIGHT,
ROCHESTER FORD,
Of Counsel for Respondents.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. Utter *et al. vs.* Franklin, *et al.* Motion for jury trial in Pima county. Filed Jan. 15–1900. Thomas Grindell, clerk.

139 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

William H. Barnes being first duly sworn on oath states: That he is the agent of the petitioners in this behalf; that said petitioners desire to take the depositions of the following-named witnesses, viz: J. F. J. Gouley, Albert Brown, A. Q. Duryee, J. E. Graham, executor of the estate of Esther Graham, E. L. Zabriskie, Wm. A. Maginnis, executor of the estate of E. B. Voorhees, E. B. Blossom, A. L. Bosworth executrix of the estate of H. C. Bosworth, John Morehouse, John Morehouse, executor of William Morehouse, James L. Utter, executor, Z. J. Brown, Mrs. M. T. Brown, executrix H. R. Brown, H. C. Brewster, executor Mary A. Robinson, James L. Utter, Jasper Westervelt, Theodore Hill, Steve Tompkins, Thos. E. Packer, Mrs. L. B. Seaver, John Greene, and J. M. Thomas, and W. N. Color, and Frank Coler and Harry Hubbard. Affiant states that none of said witnesses are residents of the Territory of Arizona, and that they
140 reside in the State of New York, and in or near the city of New York; the place where each of them is to be found is by their post-office address which is city of New York, care of Dillon & Hubbard, Western Union building in said city.

And further affiant saith not.

W. H. BARNES.

Subscribed and sworn to before me this 3rd day of February, A. D. 1900.

[SEAL.] JOHN H. MARTIN,
Notary Public, Pima County, Arizona.

My commission expires March 31, 1903.

(Endorsed:) No. 546. In the supreme court, Territory of Arizona. James L. Utter, *et al.* petitioner-, *vs.* Loan Commissioners of the Territory of Arizona. Affidavit of non-residence of witnesses, in support of application for issuance of a commission to take testimony. Filed Feb. 5, 1900. Thomas Grindell, clerk.

141 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

TERRITORY OF ARIZONA, *Maricopa County,* } ss:

Alfred Franklin being first duly sworn on oath states; that as the agent for petitioners he served the notice and interrogatories to which this is attached by handing a copy thereof to C. F. Ainsworth, the attorney general of the Territory of Arizona, and also a copy to Charles H. Akers, secretary, and George W. Vickers, auditor of the Territory of Arizona, on the 6th day of February A. D. 1900, and Hon. N. O. Murphy, governor of Arizona, on the 7th day of February, 1900.

ALFRED FRANKLIN.

Subscribed and sworn to before me this 6th day of February A. D. 1900.

THOS. ARMSTRONG, JR.,
[SEAL.] *Notary Public, Ariz.*

My commission expires March 21, 1901.

142 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

To C. F. Ainsworth, C. W. Wright, Rochester Ford, attorneys for respondents.

SIRS: You and said respondents are hereby notified that five days after the service hereof, I as attorney for the petitioners shall apply to the clerk of the supreme court in and for said Territory for a commission to take the depositions of J. F. J. Gouley, Albert Brown, A. Q. Duryee, J. E. Graham, executor of the estate of Esther Graham, E. L. Zabriskie, William A. Maginnis, executor of the estate of E. B. Voorhees, E. B. Blossom, A. L. Bosworth, executrix of the estate of H. C. Bosworth, John Morehouse, John Morehouse executor of William Morehouse, James L. Utter, executor, Z. J. Brown, Mrs. M. T. Brown, executrix H. R. Brown, H. C. Brewster, executor Mary A. Robinson, James L. Utter, Jasper Westervelt, Theodore Hill, Steve Tompkins, Thos. E. Packer, Mrs. L. B. Seaver, John Green and J. M. Thomas, W. N. Color and Frank Color and Harry Hubbard, who reside, or who are to be found in the State of New York and
143 in or near the city of New York, and the post-office address of each of them is the city of New York, State of New York

care of Dillon & Hubbard, Western Union building in said city; in answer to the interrogatories attached hereto, to be read as evidence in behalf of the petitioners on the trial of said cause.

DILLON & HUBBARD,
BARNES & MARTIN,
Att'ys for Petitioners.

Interrogatories to be Propounded to Each of the said Witnesses in Behalf of Petitioners.

First interrogatory. What is your name, age and business?

Second interrogatory. Have you at any time been an owner of any of the bonds of Pima county, Arizona payable to the Arizona Narrow Guage Railroad Company, issued July 1st, 1883, and if you answer "Yea," please state how you became the owner of the same; how much, if anything you paid for them; how long you owned them.

Third interrogatory. State fully and completely any facts or circumstances you may know with reference to the purchase, sale and delivery of said bonds at any time.

In addition to the foregoing interrogatories, there shall be propounded to W. N. Coler, and to Frank Coler, the following interrogatories.

144 A. State fully all that you may know with reference to the purchase, sale, delivery, or exchange of said bonds from the time you first had any knowledge thereof to the present time?

B. If you, or either of you have now in your possession any letter or letters, signed by officers of Pima county, bankers, professional men, or citizens of Pima county, with reference to the value, validity, or desirability as an investment, of said bonds, please attach said letters to your deposition in answer to this question as a part thereof.

To the said Harry Hubbard, in addition to the said first three interrogatories, there shall be propounded the following interrogatory:

I. Are you of counsel for petitioners in this behalf.

II. Have you now in your possession any of the bonds aforesaid as the attorney for petitioners, if so, state how many, and give the consecutive numbers of the same, and state the number of coupons still attached to said bonds, if any; and the number of coupons that have been detached from said bonds, if any; describing fully the same, and also please give to the commissioner and attach to your deposition a copy of bond No. 1; and a copy of one of the coupons attached thereto, and the numbers of the said coupons attached to said bond, and the numbers of any you may have that are detached from said bond; produce all of the said bonds which you have, and coupons aforesaid before the said commissioner, and describe in answer to this question, clearly and fully what you so produce.

III. As such attorney have you the custody and control of the said bonds and coupons for and on behalf of petitioners, ready to be

exchanged and funded as prayed for in the petition, and are you ready to make the exchange prayed for, if the said loan commissioners shall be ordered and directed so to do.

To all of said witnesses the following general interrogatory is to be propounded:

State any other fact or produce and attach to your deposi-
145 tion any document you may have of benefit to the petitioners in this case.

DILLON & HUBBARD,
BARNES & MARTIN,
Attorneys for Petitioners.

(Endorsed:) No. 546. In the supreme court, Arizona. James L. Utter, *et al. vs.* Loan Commissioners of the Territory of Arizona. Notice of intention to apply for commission to take testimony; with interrogatories attached. Service by copy admitted this 6th day of February, 1900. Rochester Ford, of counsel for respondents. Geo. W. Vickers territorial auditor; C. H. Akers, secretary of Arizona; C. F. Ainsworth, att'y general. N. O. Murphy, governor. Filed Feb. 7, 1900. Thomas Grindell, clerk.

146 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER, GEORGE ALBRIGHT, WESLEY ALBRIGHT, and William H. Maginnis, Executors of the Last Will and Testament of Elizabeth Voorhies, Deceased, Petitioners,

vs.

B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. Bruce, Secretary, Composing the Loan Commission of the Territory of Arizona, Respondents.

Motion to Dismiss.

Comes now C. F. Ainsworth, attorney general of the Territory of Arizona, and moves this court to dismiss this action, for the reason that all of the officers against whom said action was commenced have long since the filing of the petition for writ of mandamus herein, and prior to the filing of this motion ceased to be officers of the Territory of Arizona, and of the loan commission of said Territory, by reason of their terms of office having expired, of all which this court takes judicial notice. And that the present officers of the Territory of Arizona are N. O. Murphy, governor; Charles H. Akers, secretary, and George W. Vickers, auditor.

C. F. AINSWORTH,
Attorney General.

(Endorsed:) No. 546 In the supreme court of the Territory of Arizona. James L. Utter, *et al. vs.* B. J. Franklin, *et al.* Motion to dismiss. Rec'd copy of this motion March 24, 1900 Barnes & Martin, att'ys for petitioners. Filed M'ch 26, 1900. Thomas Grindell, clerk.

147 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
B. J. FRANKLIN ET ALS., Respondents.

C. W. Wright being first duly sworn on his oath says: That he is the senior counsel in the above-entitled cause. That on January 29, 1900, he was taken seriously ill, being afflicted with appendicites and mountain fever. That by reason of said illness, affiant was confined to his bed and was wholly unable to attend to any legal business until March 20th, 1900, at which time affiant returned from Santa Monica, California, whither he had been sent by his physician to expedite his recovery to strength. That on affiant's said return it was then too late to take the deposition of Walter L. Vail who resides in Los Angeles, California, by whom affiant expects to prove that at the time of the bonds in controversy herein were executed he was a member of the board of supervisors of Pima county, Territory of Arizona. That theretofore said Arizona and Narrow Gauge Railroad Company had made frequent and urgent demands on said board that said bonds be executed. That said board was earnestly opposed to the issuance and delivery of said bonds and for the reason that it did not believe
148 that said line of railway would ever be built by the ones then proposing to construct it, and for that reason refused to make and execute said bonds. That afterwards the district attorney of said county, long since deceased, who was made by law the legal adviser of said board, instructed said board that the statute authorizing the execution of said bonds was mandatory; that no discretion as to their execution was left to said board; but that, on the contrary thereof, said board was commanded by said statute to execute the same; and that its refusal so to do was an express and willful disobedience of the plain commands of the law and would assuredly get the individual members of said board into serious trouble. That thereupon and by reason only of said advise, said board did cause said bonds to be made and executed. That upon their execution said board having no safe place in which to keep them and there being an iron vault connected with the office of the treasurer of said county said board caused the treasurer of said county to come before it. That said board did thereupon carefully instruct said treasurer to take into his possession to deposit the same in said vault and to safely and securely keep the same, subject to the further orders of said board only and not to deliver them to any one on any account whatsoever until so ordered to do by said board; that said treasurer did thereupon receive said bonds promising the board that he would put the same in said vault, would safely and se-
149 curely keep them therein and would not deliver them to any person or persons whomsoever, or on any account whatsoever save upon the instructions of the board first had so to do. That some time afterwards, but how long affiant is not informed, it was rumored on the streets of Tucson that said bonds had been delivered to

said railway company. That thereupon a special meeting of said board was called, and on it being assembled said treasurer was sent for and asked what he had done with said bonds. He replied that they were still in said vault. He was requested to produce them. He was gone to get them about a half an hour when he returned pale, trembling, and evidently frightened. He then informed said board that said bonds had disappeared; that he did not know who took them, and that they had been taken without his knowledge or consent.

That an unavailing effort was then made by said board to discover where said bonds were; that it was not until a long time afterwards that said board were informed that said bonds were then in New York. That said treasurer by his said search after said abstracted bonds as aforesaid discovered that the bonds of said railway company had been left in place of said abstracted bonds.

Affiant does not now know of any one by whom he can prove all of the above facts save M. G. Samaniego, who was then, as now, a member of said board; that said Samaniego does not now recall all of said facts with the certainty and clearness of said Vail, but
150 does remember them in a general way, and to this extent his testimony is material and will corroborate the evidence of said Vail. That prior to the said illness of affiant, after much inquiry, he discovered that the last known address of said treasurer was the Soldiers' Home in the District of Columbia. That affiant is informed that said treasurer when last heard from by affiant's informants was very old and decrepid; that if he is still alive affiant believes that he can find him and secure his deposition, if time sufficient be given therefor. That the deposition of said Vail in connection with other evidence that affiant is assured can be found, that the present real owners of said bonds well knew the above and foregoing recited facts prior to their coming into the possession of said bonds, renders said evidence of said Vail material and important; that but for affiant's said illness he would have caused said evidence to be taken as he verily believes and would now have the same on file. That this branch of the defense of said action was part of the work assigned affiant to investigate and to get the true facts properly before the court.

That until the incoming of this court in January last said cause stood upon a motion of petitioners to strike the amended return of respondents from the files; and until the decision of that motion respondents did not know whether any testimony could be taken in said cause or not and if so what testimony would be relevant
151 to the issues joined on the determination of said motion in whole or in part. That at said incoming said court denied said motion and set the case for hearing for final disposition on March 26, 1900.

That since said time of the setting of said case affiant has really been physically unable to give to said case any connected attention by reason of his illness as aforesaid; that upon his return to Tucson from said January session of this court he at once advised Rochester Ford, Esq., one of the associate counsel for said respondents, of the

setting of said case; that said Ford at once said that it was impossible to properly prepare said case for trial in the time allowed by the court; that thereupon said Ford and affiant wrote a letter to the attorney general of the Territory, requesting him to so advise the court at once; but what was done by said attorney general in that behalf affiant has not been advised.

Affiant further states that by reason of his said illness no consultation has been or could have been had with said *said* associate in reference to the preparation of said case for trial in time to prepare the same for trial.

That to the end therefore that justice may be done affirnt prays the court for further time in which to prepare said case for trial; that this time is not asked for the purpose of delay merely but that said respondents and the ones who will be obliged to pay said bonds in case they shall be adjudged valid obligations of said Pima
152 county desire only the time necessary in which to intelligently and fully present to the court all of the facts relevant thereto.

Affiant further states that on the day of the date hereof he was examined by his physician, Dr. Mark A. Rodgers, who instructed affiant that he was physically unable to enter upon any work requiring a continued mental strain he yet being physically too weak and that he believed the chances would be if affiant did enter upon such labor, that it would result in a relapse and to that end the said physician did make his certificate which is hereto attached and made a part hereof.

C. W. WRIGHT.

Subscribed and sworn to before me this 24th day of March, 1900.

LAUTARO ROCA,
[SEAL.] *Notary Public, Pima County, A. T.*

My commission expires Oct. 14, 1901.

153 Mark A. Rodgers, M. D., Tucson, Arizona, to the supreme court, Territory of Arizona:

This is to certify that Judge C. W. Wright is just recovering from a severe and dangerous illness and that I have this day examined him and find it imperative that he shall abstain from any severe or complicated work and that he is not in a physical condition to attend to the trial of any lawsuit or work requiring such exercion.

MARK A. RODGERS, M. D.

(Endorsed:) No. 546. Supreme court, Territory of Arizona. James L. Utter, *et al.* petitioner-, *vs.* B. J. Franklin, *et als.* respondents. Affidavit for continuance. Filed M'ch 26, 1900. Thomas Grindell, clerk.

154 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
B. J. FRANKLIN ET AL., Respondents.

Rochester Ford, of lawful age, being duly sworn makes oath and says that he is one of the associate counsel for respondents in this case; that he is associated therein with Hon. Charles W. Wright, of Tucson, Arizona; that said Charles W. Wright has been familiar since about the year 1889 with the history of the bonds issued by Pima county to the Arizona Narrow Guage railroad, being the same bonds in litigation in this case; that the said C. W. Wright is the attorney who was employed by Pima county to defend the suit wherein one Charles Edward Lewis brought suit against Pima county to recover on certain coupons which had been attached to certain of the said bonds; that this affiant was only lately called into the case; that on conference with said C. W. Wright as to the preparation and trial of the said case it was agreed that certain testimony should be taken by affiant and certain other testimony with which said C. W. Wright was more familiar should be taken by him: that affiant has, so far as possible, prepared the testimony
155 which it was deemed proper that he should take; that said C. W. Wright, soon after the setting of this case for trial, was taken seriously ill; that for many weeks he was confined to his bed and visitors were not permitted to see him; that said C. W. Wright was too ill to attend at the sessions at which testimony was taken herein and that he was also too ill to prepare any of the testimony which he had expected to take.

Affiant further states that in preparing this case for trial it became necessary in the opinion of said C. W. Wright and of affiant to take the testimony of the executors of said Charles Edward Lewis; that the address of said executors was requested of Messrs. Barnes and Martin, attorneys, of Tucson, Arizona, who were the attorneys for said Charles Edward Lewis in the case wherein he was plaintiff; that said address was not furnished because, as affiant was informed, it was not known, and that immediately thereupon affiant addressed communication to a firm of lawyers in London, England, asking for the names and address of the executors of said Charles Edward Lewis; that no reply to such letter of affiant has as yet been received; that the depositions of such executors are in the opinion of affiant, material and essential in this case, as it is expected that such deposition will show that Charles Edward Lewis knew at the time he acquired the bonds or coupons issued by Pima county, that there had been a failure of the consideration of the same, to wit, that the said Arizona Narrow Guage railroad had never been bullt and that
156 Pima county had refused to pay any interest on said bonds.

Affiant further states that it is material and essential in this case to take the deposition of one Charles E. Walker who was secretary of the said Arizona Narrow Guage Railroad Company; that the said Charles E. Walker lives in California: that the said affiant

wrote many letters both to places in California and otherwise endeavored to learn the address of said Walker; that affiant from his best recollection makes oath and says that he wrote no fewer than eight (8) letters to various persons before he was able to find where said Charles E. Walker resides; that his residence was not discovered in time to take his deposition in this case; that it is expected to take the deposition of said Charles E. Walker and to prove by him that all money for the construction of so much of the Arizona Narrow Guage railroad as was done, was furnished by the firm of W. N. Coler and Company of New York city; that said firm was familiar with all the facts connected with the issuance of the bonds herein and of the history of the said railroad company and that said firm of W. N. Coler & Co. in taking said bonds, knew at the time that the consideration therefor had failed, to wit, that the said railroad had never been built; and that it is further expected that said W. N. Coler & Co., before they took any of said bonds or coupons, knew that the same had been repudiated by Pima county, Arizona, and that the treasurer of said county had refused to pay any interest on said bonds and that the board of supervisors of said
157 county had by official order so instructed the treasurer to refuse to pay interest.

Affiant further states that interrogatories on behalf of plaintiff for the taking of the depositions of parties therein named was served on affiant early in the month of February, 1900; that immediately and within the time fixed by statute, affiant prepared cross-interrogatories and filed them with the clerk of this honorable court; that the depositions on said interrogatories and cross-interrogatories were not filed with the clerk of this court until the 20th day of March, A. D., 1900; that in the preparation of said interrogatories affiant was unable to confer with said C. W. Wright because the said C. W. Wright was then too ill to be spoken to; that some of the witnesses whose depositions were to be taken failed to give their depositions, and that it will be necessary to take them.

Affiant further states that the bonds and coupons sued on herein were not exhibited to the commissioner herein till the 21st day of March, 1900, and that a copy of the depositions taken herein was not seen by affiant till March 20th, 1900; that after inspecting said bonds, coupons and depositions, it became necessary in order to prepare the defense of this case to take further evidence in the city of New York and in the city of London, England and that it has been impossible to take such evidence before the day fixed for the sitting of this case. Affiant further states that it was impossible to
158 prepare for the trial and argument of this case in the short space of time between March 20th, 1900, and March 26th, 1900; that the preparation, trial and argument of this case involves the facts connected with one hundred and fifty separate bonds claimed to be owned by many separate owners, and also a careful study as to the facts connected with the coupons, amounting to thirty-eight hundred (3,800) or more, detached from said bonds, which coupons, as is claimed on the part of petitioners, have passed from hand to hand. Affiant makes oath and says that he has used

in the preparation of this case, the utmost diligence in his power and has given it the full attention which the importance of the case demands, and affiant represents that under all the circumstances it has been a matter of physical impossibility to prepare this case for trial in the time intervening between the day when this case was set and the day set for trial, to wit, March 26th, 1900.

Affiant further represents that the further evidence which will be taken herein is, in the opinion of affiant, absolutely necessary to a proper presentation of the defense herein and that the failure to take such additional testimony is not due to negligence, and that a continuance herein is not asked for for delay, but in order that justice may be done.

ROCHESTER FORD.

Subscribed and sworn to before me this 24th day of March, 1900.
[SEAL.] EMMA A. MILLER,
Notary Public, Pima County, Arizona.

My commission expires Oct. 12, 1902.

159 (Endorsed:) No. 546 In the supreme court of the Territory of Arizona. James L. Utter, *et al.* petitioners, *v.* B. J. Franklin, *et al.* respondents. Affidavit for continuance. Filed M'ch 26—1900, Thomas Grindell, clerk.

160 In the Supreme Court of the Territory of Arizona.

J. L. UTTER ET AL., Petitioners,
vs.
B. J. FRANKLIN ET AL., Respondents.

Motion to Dismiss.

Come now respondents and move the court to dismiss the petition herein for the reason that the writ asked for would be unavailing, because the loan commission of Arizona has been abolished by act of the Arizona legislature, to wit, act No. 32 of the 20th Legislative Assembly.

ROCHESTER FORD,
Of Counsel for Respondents.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. Utter *et al.*, petitioners, *v.* Franklin *et al.*, respondents. Motion to dismiss. Service of copy acknowledged. March 27, 1900. W. H. Barnes, att'y for petitioners. Filed M'ch 27, 1900. Thomas Grindell, clerk.

161 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
B. J. FRANKLIN ET AL., Respondents.

Come now respondents by their attorneys and move that the petitioners herein be required to furnish security for costs, and in sup-

port of this motion respondents aver that as shown by the pleadings herein the petitioners are non-residents of the Territory of Arizona and have no property in said Territory.

ROCHESTER FORD,
Attorney for Respondents.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al.* petitioners, *v.* B. J. Franklin, *et al.* respondents. Motion for security for costs. Service of copy acknowledged March 27, 1900. W. H. Barnes, att'y for petitioners. Filed M'ch 27—1900, Thomas Grindell, clerk.

162 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET ALS., Petitioners,
vs.
B. J. FRANKLIN ET AL., Respondents.

TERRITORY OF ARIZONA,
Maricopa County, } ss:

C. W. Wright being first duly sworn says: That he is one of the attorneys in the above-entitled cause, aiding in the defense thereof. That since the last adjournment of said court the time of affiant has been largely taken up in his official duties. That affiant is a member of the code commission, which commission is now engaged in the work of revising the written laws of Arizona and has been for more than six months last past. That affiant has been compelled to give to said work almost his entire time and to the exclusion of nearly all other business; that because thereof affiant has not read and has had no opportunity to read the depositions taken in this case, nor any thereof; that affiant is, therefore, at this time, unable to present said case or to be of any aid to the court in its correct determination; that said work of revising the laws of Arizona is of great public importance, as affiant believes, and the same must be completed in time to have the revision and the com-
163 mission's report thereon printed by the next incoming of the legislature; and to that end, affiant has given his said time and has been compelled so to do.

Affiant further says that the issues involved in said cause and the amount at stake are of great importance and of dire consequence to the tax-payers of Pima county, that at this time affiant cannot present said cause, and, in the interest of fairness and justice, affiant asks that respondents be given further time.

C. W. WRIGHT,

Subscribed and sworn to before me this 1st day of June, 1900.

THOMAS GRINDELL,
[SEAL.] *Clerk Supreme Court.*

(Endorsed:) No. 546. In the supreme court, of the Territory of Arizona. Jas. L. Utter, *et al. vs.* B. J. Franklin, *et al.* Affidavit of Judge C. W. Wright. Filed June 1st, 1900. Thomas Grindell, clerk.

164 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
B. J. FRANKLIN ET AL., Respondents.

TERRITORY OF ARIZONA, *Pima County,* } ss:

Rochester Ford, of lawful age, being duly sworn according to law, makes oath and says, that he is of counsel for the respondents in the above-entitled cause: that since the last session of this honorable court, he has endeavored in conjunction with Hon. Charles V. Wright, with whom affiant is associated, to prepare this case for a hearing at this present session of court; that the deposition of one Charles E. Walker was material and indispensable herein; that affiant endeavored to locate said Walker, and after trying unsuccessfully for a long time to learn his address, did find that he lived at the place called Long Beach, California, that affiant made a trip to said place to ascertain certain evidence from said Walker, who had been the secretary of the Arizona Narrow Guage Railroad Company, and after learning from him that he knew facts out of which this controversy arose, affiant prepared interrogatories and caused the deposition of said Charles

165 E. Walker to be taken; that the same was not received till May 29, 1900; that affiant also prepared interrogatories for the further depositions of Leonard Hole and W. N. Coler, Jr.; that the same were promptly forwarded to New York, but were not returned till a late date, to wit, May 26, 1900; that Bryan W. Tichenor, to whom the interrogatories and cross-interrogatories were sent wrote this affiant as follows, under date of May 21, 1900: "It was only after the most persistent and repeated calls upon these people that the notary was able to induce them to give their answers to the interrogatories. By this I do not mean to charge them with contumacy, but they certainly were most dilatory and neglectful;" that the original of said letter is hereto attached for the inspection of the court; that said depositions were not received, because of the delay of said Hole and W. N. Coler, Jr., in time for inspection and sufficient preparation of this case.

Affiant further states that the district court of the first judicial district of the Territory of Arizona, of the bar of which court this affiant is a member, has been in session all or a great part of the time since the last session of this honorable court; that affiant has been almost constantly engaged in the trial and argument of cases in said court, and that his entire time has been consumed in the duties in said court and in the taking of the depositions herein.

166 Affiant further states that it has been a matter of physical impossibility for him, and he believes that it would have been impossible for any one else, to attend at the session of the said district court and also to prepare this case for trial; and that affiant has not been able to and has not, for the reasons above stated,

studied the testimony herein as he would do if further time were granted.

Affiant further states that the facts out of which this cause of action arose date back to the year 1882, and that the evidence taken herein is voluminous; that the questions of law and fact involved are such as require far more time than has elapsed since the last session of this honorable court, and that the setting of this case to be heard at this time was too soon a setting for the proper preparation and argument of the said cause.

Affiant further represents to this court that in his opinion the interests of his clients demand further time for the preparation of this case and that his clients' interests will be jeopardized unless further time is granted, and affiant further states that this application is not made for delay, but that the interests of justice may be subserved.

ROCHESTER FORD.

Subscribed and sworn to before me this 31st day of May, 1900.

WILEY E. TUSSING,
[SEAL.[*Notary Public, Pima County, Arizona.*

My commission expires April 29, 1901.

167 NEW YORK, *May* 21, 1900.

Rochester Ford, Esq., counselor-at-law, Tucson, Arizona.

MY DEAR MR. FORD: Herewith I hand you carbon copy of depositions of Leonard Hole and W. N. Coler Jr. in case of Utter *v.* Franklin *et al.*, as per your directions under date of April 28th, last. The original has been, today, forwarded to clerk of supreme court at Phœnix, as directed.

In explanation of the bill for same, herewith enclosed, I want to say that I turned over the matter to one of my associates—Mr. Woodle, who is a notary (I am not), and it was only after the most persistent and repeated calls upon these people that he was able to induce them to give their answers to the interrogatories. By this I do not mean to charge them with contumacy, but they certainly were most dilatory and neglectful. The amount charged does not compensate for the time consumed in the effort to get them to give their answers, but because the depositions were so short I did not see how I could very well charge more.

Yours truly, BRYAN W. TICHENOR.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al.* petitioners, *vs.* B. J. Franklin *et al.* respondents. Affidavit of Rochester Ford. Filed June 1st, 1900. Thos. Grindell, clerk.

168 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
LOAN COMMISSIONERS, ETC., Respondents.

Whereas this cause was submitted by order of the court upon abstract and briefs to be thereafter filed without formally offering, presenting or reading the evidence of the respective parties. It is stipulated, that all the evidence produced, exhibited, taken and reported by C. D. Hoover the referee appointed by the court, including all documents offered and all original evidence introduced and exhibited, and reported by him as having been exhibited and offered, and the testimony of witnesses for the respective parties taken before him all of which is contained in his report is offered to the court and introduced by the respective parties as appears in his report, and the exhibits thereto attached and depositions of the witnesses, together with the stipulations of the parties appearing in said report are all submitted to the court for consideration, and any objection may be urged in the briefs of counsel and presented to the court for consideration to any and all of said evidence that might have been made or urged to the court had the same been offered in open court upon the trial of the cause, and at the time the same was offered. And either party
169 may take and preserve exceptions to each and every ruling against him by the court upon the final decision of said cause, as fully and completely as if objection, ruling and exception had been made at the time such evidence would have been offered in the ordinary course of trial in open court. And it is further stipulated, that all the depositions including that of Walter L. Vail which have been taken under stipulation or notice, or which may be taken upon stipulation or notice heretofore made but not yet returned and filed with the clerk are regarded as submitted subject to such objection as could properly be urged if the deposition was read in open court.

Dated June 9, 1900.

BARNES & MARTIN,
Att'ys for Petitioners.
C. W. WRIGHT,
ROCHESTER FORD,
Of Counsel for Respondents.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al. vs.* Benjamin J. Franklin *et al.* Stipulation. Filed June 11th, 1900. Thomas Grindell, clerk. By Angie B. Parker, deputy.

170 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and ELIZABETH B. VOORHEES, Plaintiffs,
vs.
B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. Bruce, Secretary, Loan Commissioners of the Territory of Arizona, Defendants. } No. 546.

Barnes & Martin, attorneys for plaintiffs.
C. W. Wright and Rochester Ford, attorneys for defendants.

Opinion of Sloan, J.

The plaintiffs, December 31, 1896, filed their petition in this court, which prayed for a writ of mandate to compel the defendants, who were then respectively, governor, auditor and secretary of the Territory and who, by virtue of holding said offices at the date of the filing of said petition, were the loan commissioners of the Territory, to fund the bonds and the interest due thereon issued by Pima county in aid of the Arizona Narrow Gauge Railroad Company under the provisions of a territorial act of February 21, 1883. The defendants demurred to the petition and by way of answer, set up that the bonds sought to be funded, in the suit of Lewis *vs.* Pima County, by the district court of said Pima county were de-
171 clared to be void and of no binding obligation upon the said county; that the judgment of the district court was upon appeal, affirmed by the supreme court of the Territory; and on appeal from the judgment of this court, the latter was affirmed by the Supreme Court of the United States; that the judgment so rendered and affirmed in the Lewis case, was *res adjudicata* and binding upon the plaintiffs in this suit.

The records of this court in the present case show that the demurrer to the petition was sustained and the petition dismissed, whereupon an appeal was taken to the Supreme Court of the United States. The latter court reversed the judgment of this court, and remanded the cause "for further proceedings not inconsistent with the opinion."

Utter *vs.* Franklin, 172 U. S. 424.

In the opinion the Supreme Court held that the judgment in the case of Lewis, holding that the bonds were invalid because the territorial legislature had no authority to authorize their issuance under the organic law, "was *res adjudicata* only of the issues then presented, of the facts as they then appeared, and under the legislation then existing." That the act of Congress of June 6, 1896 cured this defect and validated the territorial act of February 21, 1883, and made it the duty of the loan commissioners to fund the bonds in question. Upon the filing of the mandate of the Supreme Court in this court, the de-

fendants asked leave to file an amended return raising
172 new issues of fact and setting up that the bonds in question were, "not sold or exchanged in good faith and in compliance with the act of the legislature by which they were authorized," and so were not of the class of bonds validated by the act of June 6, 1896 and required to be funded thereby. Leave to file this amended return was granted for the reason that the record in this court, where the cause originated, discloses that the judgment of this court from which the appeal was taken to the Supreme Court of the United States, was rendered upon the issue of law raised by the demurrer, and not upon any issue of fact raised by the original return. We took the view that in the state of the record, the mandate of the Supreme Court reversing the cause and remanding it to this court "for proceedings not inconsistent with the opinion," made it our duty to consider and decide any issue of fact properly pleaded, which amounts to a defense and which is not in fact decided by the Supreme Court in passing upon the issue of law presented by the demurrer; that under the law and practice regulating appeals of this character, such a mandate being general in its terms, is to be construed as justifying this court in considering and deciding any question left open by the mandate and opinion of the appellate court.

Ex parte The Union Steamboat Company, 178 U. S. 318.

The issue of fact raised by the amended return and which, in our view, was left open by the opinion and mandate of the Su-
173 preme Court, involves the question as to whether the bonds were exchanged by the county of Pima for the bonds of the Arizona Narrow Gauge Railroad Company in good faith and in compliance with the act of the territorial legislature of February 21, 1883. Upon the order permitting the defendants to file their amended return being made, a commissioner was appointed to take and report the testimony which the parties might desire to put in, bearing upon the new issue of fact raised by the amended return. The evidence has all been taken and is now before us.

The defendants now present two objections to the granting of the writ of mandate, which arise out of facts that did not exist at the time the case was heard in this court on the demurrer. These are, first, that the action was begun against Benjamin J. Franklin, governor, C. P. Leitch, auditor and C. M. Bruce, secretary, and that each of the defendants has long since been superseded in office by another person and that therefore the action should abate. Second, that the loan commission has ceased to exist by repeal of the statute creating the same, and no provision was had in the repealing statute reserving from its operation pending proceedings, and that therefore the action must abate because there is no officer or person upon whom the duty rests to fund the bonds in question or against whom the writ of mandate may be enforced.

174 Upon the first point raised, we deem it sufficient to say, that the weight of authority in the State courts is in favor of the view that the writ of mandamus operates on the office rather than on the individual who occupies the office, and therefore does not

abate by a change of person-el in the office, and that no revivor is necessary against a successor of the officer against whom the proceedings were instituted. This also appears to be the rule as followed in the Supreme Court of the United States whenever a proceeding is to enforce a continuing duty against a corporation or municipality.

Thompson *vs.* U. S., 103 U. S. 482;
Commissioners *vs.* Ballou, 99 U. S. 624.

The loan commissioners were by the statute creating the board, made a continuing body, and the delinquency complained of, related to a continuing duty of the commission, and we see no reason why the doctrine as applied in the above cases, does not apply to the present proceeding.

Hollen Parker, petitioner, 131 U. S. 221.

The question as to whether the loan commission has been abolished, is one which involves a consideration of not only the appealing statute, but as well, the various acts, congressional and territorial, relating to the creation of the commission, its duties and the general subject of funding. In the Revised Statutes of 1887 there was incorporated as "title XXXI," an act which provided for the creation of a commission to be known as the loan commis-
175 sioners, and the funding by this commission of the outstanding and existing indebtedness of the Territory. This commission was to be composed of the governor, auditor and secretary of the Territory. Congress, by the act of June 25, 1890, amended the territorial act in important particulars and then "approved and confirmed" the same, "subject to future territorial legislation." The territorial legislature, construing the clause "subject to future territorial legislation" to mean that Congress, having taken up the territorial act of 1887 and amended it, before making it binding and operative upon the Territory, chose to confer upon the latter the privilege of consenting to, or disapproving of its provisions, by its act of March 19, 1891, supplemented the congressional act by additional provisions intended to more perfectly carry out its provisions, and in the first section declared that the latter act should "be and the same is hereby now re-enacted as of the date of its approval." The language used in the territorial act, indicates that the territorial legislature intended to approve of the congressional act and accept its provisions, under the permission granted and expressed in the clause, "subject to future territorial legislation." Whether this construction was primarily right or not, it has been subsequently followed by the Legislative Assembly of the Territory and acquiesced in by Congress. Congress, by the act of August 3, 1894, amended section 15 of the act of June 25, 1890, by extending its provisions so as to permit
176 the funding of additional indebtedness. When the next legislature convened after the passage of the congressional act just mentioned, construing, as it did its predecessor, the clause "subject to future territorial legislation" to mean that the congressional act should only become operative when accepted by the

Territory through its General Assembly, by act approved March 19, 1895, ratified and confirmed the objects, purposes and provisions of the congressional act. In the congressional act of August 3d, 1894, and in the curative act of Congress of June 5, 1896, the act of Congress of June 25, 1890, is referred to, and no mention is made of a re-enactment of the same by the territorial legislature, which is significant as indicating that Congress recognized the act of June 25, 1890, as having become operative and as continuing in force and as constituting the existing law upon the subject of funding. Congress having full authority to legislate directly for the Territory, and the territorial legislature having only such power as is specifically delegated to it by Congress, whenever the latter legislates upon any subject pertaining to the Territory, such legislation has the force and effect of a constitutional provision and becomes a part of the organic law. Had the clause, "subject to future territorial legislation" not appeared in the act of June 25, 1890, unquestionably the act would have become immediately operative without the consent or acquiescence of the Territory, and no subsequent legislation
177 by the territorial legislature would have been needed to give it effect or could in any way affect its provisions. In the light of the contemporaneous construction placed upon the clause "subject to future territorial legislation" by the legislature of the Territory, and in view of the fact that Congress thereafter invariably referred in subsequent legislation to the act of Congress of June 25th, 1890, and made no mention of any re-enactment of the same by the Territory, and considering the relation which the Territory sustains to Congress, we are led to the conclusion that the act of June 25, 1890, is now to be construed as having been accepted in accordance with the permission granted to accept or refuse the same, and having been accepted, is now the paramount law upon the subject of funding and become a part of the organic law, to the extent at any rate that it may not be changed so as to render any of its provisions inoperative by any act of the territorial legislature, except with the express consent of Congress.

The repealing statute which we have referred to, being act No. 32 of the Laws of 1899, reads as follows: "That paragraph 2039, section 1, chapter 1, title XXXI, of the Revised Statutes of the Territory of Arizona; also that section 1 of act No. 79, Session Laws of the 16th Legislative Assembly of the Territory of Arizona; also act No. 32 and act No. 74, Session Laws of the 18th Legislative Assembly of the Territory of Arizona are hereby re-
178 pealed." Paragraph 2039, referred to in this act, was reincorporated as the first section of the congressional act of June 25, 1890, and reads as follows: "For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona. The governor of the said Territory, together with the territorial auditor and the territorial secretary and their successors in office, shall constitute a board of commissioners to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the power and perform the duties hereinafter provided." Act No. 79 referred to, is the act

of March 19, 1891. Acts No. 33 and acts No. 74 sought to be repealed by the act, do not pertain to the creation of the board of loan commissioners, and their consideration is not important in this connection.

The act of Congress of June 25, 1890 covered the whole field of the previous territorial legislation upon the subject of funding, and included such new legislation as to clearly indicate the intent that it should take the place of the territorial act of 1887. When two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the former and embraces new provisions plainly showing that it is intended as a substitute for the first act, it will operate as a repeal of that act.

U. S. *vs.* Tynin, 11 Wall. 88.

The act of Congress being revisory in its terms, embracing
179 new provisions and covering the whole subject of funding, supplemented and thereby repealed the territorial statute of 1887. As repeals by implication are not favored, the repeal of the first section of the statute of 1887 can therefore have no effect to repeal the similar provision of the act of June 25, 1890.

Again, by the attempted repeal of the first section of the act of March 19, 1891, which, as we have seen, provided in terms "that the act of Congress entitled, 'An act approving, with amendments, the funding act of Arizona approved June 25, 1890,' be and the same is hereby now re-enacted as of the date of its approval." the intent of the legislation is uncertain in that it is not made evident whether the repeal of said section is to be construed as an attempt to repeal the whole or only a part of the congressional act, if it can possibly be construed as tending to either result. It can hardly be construed as an attempt to repeal the whole of the act of June 25, 1890, inasmuch as the other sections of the act of March 19th, 1891 were excepted from the repealing act and these were supplemental to the congressional act. If the repealing of section 1 of the law of 1891 be construed as a repeal of only a part of the act of June 25, 1890, how then can the court give it effect by declaring what portion of said act it was designed and intended to affect? Irrespective therefore, of the question of the power of the territorial
180 legislature to repeal the congressional act creating the loan commission, it is more than doubtful if the act of 1899 can be construed so as to effect that result.

Mr. Justice Brown, in the opinion delivered in this case in the Supreme Court, construing the act of Congress of June 6, 1896, said: "The first section of the act required the funding of all outstanding obligations of said Territory and its municipalities, and all outstanding bonds, &c., of the Territory and its municipalities, 'heretofore authorized by legislative enactment of said Territory, bearing a higher rate of interest than is authorized by the aforesaid funding act, approved June 5, 1890,' which said bonds, &c., 'have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized:' and the second section confirms, approves and validates all bonds and other evi-

dences of indebtedness theretofore issued under the authority of the legislature, and authorized to be funded by the first section, and declares that they may be funded as in this act provided, until January 1, 1897." As we have said, therefore, under the opinion of the Supreme Court and its mandate, as well as under the terms of the act of June 6, 1896, we are limited under the issues of fact raised by the amended return, to the inquiry as to whether the bonds in question "have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they
181 were authorized." The first two sections of the act of February 21, 1883, read as follows:

"SECTION 1. Upon information in writing to the chairman of the board of supervisors of Pima county, Arizona Territory, by the president of the Arizona Narrow Gauge Railroad Company, the corporation of that name which filed its articles of association with the secretary of said Territory, on the 23rd day of November, A. D. 1882, that said railroad company is ready to exchange bonds with the said county of Pima, according to the provisions of this act, it shall be the duty of said chairman, and he is hereby directed to call a meeting of said board, to be held within five days after the receipt of said notification, and it shall be the duty of said board of supervisors, and they are hereby directed to meet within five days, at the county-seat of said county, and then and there to order issued two hundred thousand dollars of bonds of said county, in denominations of one thousand dollars each, and bearing interest at the rate of seven per cent. per annum, interest payable semi-annually, the principal payable in twenty years, which said bonds, and the interest coupons thereto attached shall be signed by said chairman and the clerk of said board, and shall, within thirty days after the said order of issuance thereof has been made, be delivered by the clerk of said board to the county treasurer of said county of Pima, to be by him disposed of as hereinafter provided, and said county treasurer shall receipt to the said clerk for the said bonds."

182 "SEC. 2. Upon the application of said railroad company to the said treasurer, and the tender by said company of fifty thousand dollars of the first-mortgage bonds of said company in like denominations, bearing like interest and payable in like time as those of said county, it shall be the duty of said treasurer, and he is hereby directed to deliver fifty thousand dollars of bonds of said county to the president and secretary of said railroad company, in exchange for fifty thousand dollars of the first-mortgage bonds of said railroad company, so tendered as above provided. And whenever, and so often as — five *each* miles of said railroad shall have been graded, laid with ties and iron, said treasurer shall upon proof thereof, which proof shall be the certificate of the county surveyor to that effect, exchange with the said president and secretary of said railroad company fifty thousand dollars of said bonds of said Pima county for fifty thousand dollars of said bonds of said company, for each five miles so completed, until the two hundred thousand dollars of bonds of said Pima county are exchanged for a like number of bonds of said railroad company."

It is to be noted that under the provisions of these sections of the statute, that the bonds of the county were to be exchanged for the bonds of the railroad company under the condition therein provided, and does not provide for a sale of the same. It is also to be noted that of the issue of two hundred thousand
183 dollars of the bonds of the county, called for by the act, fifty thousand dollars was to be exchanged upon the organization of the company, and upon notice to the county of the company's readiness to exchange a like amount of bonds, the county was to deliver to the company, bonds to the amount of fifty thousand dollars; that a like amount was to be delivered by the county treasurer to the company in exchange for a like amount of railroad bonds whenever the county surveyor should certify that five miles of the company's railroad had been graded and laid with ties and iron and thereafter, upon the completion of an additional five miles of said railroad as provided, the county treasurer, upon proof thereof by the certificate of the county surveyor to that effect, exchange a like amount of county bonds for the same amount of railroad bonds, until the full issue, two hundred thousand dollars of the county bonds, had been exchanged for a like amount of railroad bonds. Under the act, therefore, the question is narrowed to the inquiry as to whether each provision of the statute relating to the exchange of bonds was complied with by the railroad company on the one part, and the officers of the county on the other. The records of the board of supervisors of Pima county show that on the 26th day of April, 1883, W. H. Culver, president of the Arizona Narrow Gauge Railroad Company, addressed a letter to James H. Toole, chairman of the board of supervisors of Pima county, notifying the latter that the Ari-
184 zona Narrow Gauge Railroad Company was ready to exchange its bonds for the bonds of the county in accordance with the provisions of the act of February 21, 1883. On May 5, 1883, as it appears in the minutes of the board, an order was made that two hundred thousand dollars of bonds of the county be issued and be placed in the hands of the county treasurer upon the condition expressed that the Arizona Narrow Gauge Railroad Company execute a bond to the county in the sum of five hundred dollars, conditioned that if the county bonds were not exchanged in accordance with the provisions of the act of February 21, 1883, that the said railroad company would repay to said county, all expense incurred in the issuance of said bonds. A receipt was introduced in evidence dated August 3, 1883, and signed by one J. C. Elliott, then county treasurer, acknowledging the receipt from the clerk of the board of supervisors of the county, of two hundred bonds of the denomination of one thousand dollars each, to be issued to the Arizona Narrow Gauge Railroad Company as provided by law. It appears in evidence that the first exchange as provided by the act, of fifty thousand dollars county bonds for a like amount of railroad bonds, was made at some date during the year 1883. This is shown by the record in an action brought by a tax-payer of the county against the board of supervisors and the county treasurer in the district court of Pima county

during the latter part of the year 1883, to restrain the latter
185 from accepting the bonds of the Arizona Narrow Gauge Railroad Company in exchange for the bonds of the county. It is also shown that these fifty thousand dollars were delivered during the year 1883 to the railroad company by the county, by the minute entry of the board of supervisors, showing the action of the board taken with reference to an application filed June 16, 1884 by the railroad company, and an offer by the railroad company to return to the county, fifty thousand dollars of county bonds and accept in full payment therefor, county warrants of the face value of twenty-two thousand five hundred dollars. It appears from the evidence that prior to the year 1886, the railroad company had expended in the construction of the road, not to exceed twelve thousand dollars; that during that year the railroad company entered into a contract with one W. W. Walker, wherein the latter undertook to complete the road in accordance with the act of the legislature and original intent of the company; that under this contract, the county bonds held by the railroad company, were turned over to Walker. It further appears that Walker represented the firm of Coler & Company, bankers and brokers of New York city; that under the Walker contract, said Coler & Company transmitted to the Bank of Tucson for the building of the road, fifty-two thousand nine hundred, and forty one-hundredths dollars; that there was graded and laid with ties and rails, ten miles of road by Walker under his contract, and that thirty miles in all, were graded. It also appears that when the first five miles of
186 road had been built, the county treasurer turned over to Walker for Coler & Company, under their contract with the railroad company, fifty thousand dollars of county bonds in exchange for a like amount of railroad bonds, and that subsequently, upon the completion of the ten miles of road, a like exchange was made of an additional fifty thousand dollars. George J. Roskruge testified that in 1886 he was county surveyor of Pima county, and examined the railroad constructed by the Arizona Narrow Gauge Railroad Company; that he measured the road on two occasions and found upon the first, that there *was* five miles graded, laid with ties and rails, and upon the second, found that there *was* ten miles of road graded and laid with ties and rails, and gave his certificate to the county treasurer upon both occasions, in the language of the act of February 21, 1883, stating the facts as he found them.

It further appears that there was graded under the Walker contract, in the neighborhood of thirty miles of road, but only the first ten miles of the road were ever laid with ties and rails; that for various reasons, Walker or Coler & Company either were unable to, or chose not to, complete the road. The records of the board of supervisors show that in 1887 an agreement was entered into between the railroad company and Walker on the one part, and the board of supervisors and the county treasurer on the other part, whereby it was agreed that the county should sell to the railroad company and Walker, one
187 hundred and fifty thousand dollars of railroad bonds held by the county, to said railroad company for twenty-five cents

on the dollar, and to receive in payment the bonds of the county at par, and the railroad company and Walker agreed to build and put into operation, sixty miles of said road and secure the majority of the trade of the town of Globe for the city of Tucson. There were other provisions in the contract relating to the exchange of the remaining fifty thousand dollars of county bonds held by the treasurer, in exchange for a like amount of bonds of the railroad and the sale of the latter to the railroad company upon same terms as were provided in the contract for the bonds already exchanged. It further appears that this agreement was not complied with on the part of the railroad company or Walker, and that on July 23, 1890, the board of supervisors made an order and transmitted the same to the county treasurer, directing the latter to cancel the remaining fifty thousand dollars of county bonds held by him. It further appears from the evidence in the case, that nothing has ever been paid by the county in the way of interest upon bonds of the county delivered to the railroad company

Do these facts show that the bonds in question are included among those required by the act of Congress of June 6, 1896 to be funded? It must be conceded that the county of Pima derived little or no benefit from the building of the few miles of the Arizona Narrow Gauge railroad; however, there can be no
188 question under the proof, that the terms of the act of February 21,1883 were fully complied with, both on the part of the county and, as well, on the part of the railroad company in the matter of the issuance and exchange of the bonds to the extent that the legislative act specifically provided. There was nothing in evidence showing bad faith on the part of the railroad company in so far as the first exchange of bonds was concerned, nor is there any evidence which shows bad faith on the part of the company or its contractor, Walker and his principals, Coler & Company, except their failure to continue the building and equipment of the road after the completion of the thirty miles of grading and laying of ten miles of track, except such inferences as may be drawn from the fact that both the railroad company and Coler & Company had difficulty in raising the money for the payment of the work done and did not have the resources to go on and complete the work. Can the court say that notwithstanding the fact that the bonds were exchanged in compliance with the terms of the act of February 21, 1883, they are invalid and not within the provisions of the act of Congress of June 6, 1896, because subsequent to their issue, the original holders of those bonds failed to complete the railroad and the county of Pima thereby received no benefit from the same. The question of a failure of consideration is to be distinguished from that of an exchange of bonds in good faith under the act of June 6, 1896, unless the failure of consideration was due to a failure on the part of
189 the holders of the bonds to comply with the provisions of the act authorizing their issuance. The legislative act was exceedingly liberal in its terms, and contained no safeguard against the failure of the railroad company to build or operate the road. The only provision looking to the protection of the county was the

one which required a certificate of the county surveyor, showing that each five miles of the road was graded and laid with ties and iron, as a condition precedent to the exchange of each fifty thousand dollars of county bonds for a like amount of railroad bonds. As the Supreme Court has held in this case, Congress, by the act of June 6, 1896, has validated the territorial act of February 21, 1883. And as the latter did not make the completion of the road a condition precedent to the issuance of the bonds, nor make their validity dependent upon the subsequent conduct of the railroad company, bad faith cannot be predicated of the transaction so long as there was not only a substantial but a literal compliance, as well, with the requirements of the act under which they were issued. We are forced to the conclusion, therefore, that no facts have been shown under the amended return, which would warrant us in holding that the bonds in question were excluded from the provisions of the act of June 6, 1896, but on the contrary, find that it is our plain duty under the decision of the Supreme Court construing said congressional act, and mandatory upon us, to issue the writ of
190 mandate prayed for, requiring the loan commissioners to fund the bonds in question, together with the interest due thereon under the provisions of the act of June 25, 1890.

RICHARD E. SLOAN,
Associate Justice.

We concur.

WEBSTER STREET,
Chief Justice.

FLETCHER M. DOAN,
Associate Justice.

GEO. R. DAVIS,
Associate Justice.

(Endorsed:) No. 546. James L. Utter, *et al.* pl'ffs *vs.* B. J. Franklin, *et al.* respondents. Opinion of court. Recorded Book 5, pages 48-60. Filed M'ch 22—1901. Thos. Grindell, clerk.

191 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners, *vs.* B. J. FRANKLIN ET AL., Defendants. } Motion for New Trial and Rehearing.

Come now defendants herein, and move the court to set aside its order and judgment rendered herein, and to grant defendants a new trial and rehearing of this action, and in support of this motion defendants allege:

1. That the court admitted improper evidence for plaintiffs over defendants' objections.
2. That the court refused to admit proper evidence for defendants.
3. That the order and judgment are against the law.
4. That the order and judgment are against the evidence.

5. That the order and judgment are against the law and the evidence.

6. That the order and judgment are on evidence insufficient in law.

7. That the evidence does not support the order and judgment.

8. That the court should have rendered its judgment for defendants.

192 9. That the court erred in refusing to dismiss this petition for want of jurisdiction.

10. That the court erred in holding that the loan commission of Arizona was still in existance.

Wherefore defendants move.

Phœnix, Arizona, March 22, 1901.

C. F. AINSWORTH,
Attorney General,
By ROCHESTER FORD.
ROCHESTER FORD,
Of Counsel for Defendants.

(Endorsed:) No. 546. Supreme court, Territory of Arizona. James L. Utter, *et al.* petitioners, *vs.* B. J. Franklin, *et al.* defendants. Motion for new trial and rehearing. Filed M'ch 22, 1901, Thos. Grindell, clerk.

193 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
B. J. FRANKLIN ET AL., Defendants. } No. 546.

Precept.

The Territory of Arizona to the sheriff of Pima county, Greeting:

Whereas, on an appeal in the above-entitled cause, by the appellant- herein, the supreme court of the Territory of Arizona, did on the 22nd day of March, 1901, render judgment in said cause for petitioners; and whereas the above-named defendants did, on the 22nd day of March, 1901, and within fifteen days after the rendition of said judgment by said supreme court, file in the office of the clerk of said court, *its* certain motion for rehearing of said cause, a duly certified copy of which motion accompanies this precept.

Now, therefore, you are hereby commanded that you deliver said certified copy of the said motion for rehearing to Messrs. Barnes & Martin attorneys of record for petitioners, whose residence and place of business is Tucson, Arizona, and that you make the return of this precept with your proceedings thereunder entered thereon to this court forthwith.

194 Witness, the Honorable Webster Street, chief justice of the supreme court of the Territory of Arizona, and the seal of said court.

[SEAL.]

Done at Phœnix, the capital of Arizona this 26th day of March, 1901.

THOMAS GRINDELL,
Clerk of the Supreme Court of Arizona.

OFFICE OF THE SHERIFF, }
Pima County. }

I hereby certify that I received precept on the 28th of March, 1901, and personally served the same on Messrs. Barnes and Martin on the 28th day of March, 1901.

Dated this 28th day of March, 1901.

FRANK E. MURPHY, *Sheriff*,
By E. DRACHMAN, *Deputy Sheriff*.

(Endorsed:) In the supreme court of the Territory of Arizona. No. 546 Jan. term, 1901. James L. Utter, *et al.*, petitioners *vs.* The Loan Commission, respondants. Precept. Filed M'ch 29, 1901. Thos. Grindell, clerk.

195 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs, Petitioners,
vs.
B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. Bruce, Secretary, Loan Commissioners of the Territory of Arizona, Defendants.

No. 546. Findings of Fact.

The court finds and states the facts in the above-entitled case to be as follows:

I.

That the Arizona Narrow Gauge Railroad Company, mentioned in the act of the legislature of the Territory of Arizona approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," filed its articles of association with the secretary of the said Territory on the 23d day of November, 1882, which articles specified that the undersigned subscribed to the shares opposite their names to the capital stock of the corporation under the general railroad act of the Territory of February 14, 1879 for the purpose of constructing, owning and maintaining railroads; the line to begin at Tucson, Arizona, thence by the most favorable route
196 in a northerly direction along the San Pedro river to its mouth; thence in a northeasterly direction along the Gila river to San Carlos; thence in a northerly direction to the San Carlos river; thence northeasterly to Fort Apache; thence northeasterly to the 35th parallel, passing into and through the counties

of Pima, Pinal, Graham, Gila and Apache; signed by eleven persons, each subscribing two hundred shares of the value of $2,000, which articles are in words and figures as follows, to wit:

"We, the undersigned, residents of the Territory of Arizona, have subscribed and do hereby subscribe the number of shares and the sums representing the value thereof placed opposite our names hereunder to the capital stock of a corporation to be formed under the provisions of the general railroad incorporatien act of Arizona Territory, approved February fourteenth, 1879, for the purpose of constructing owning and maintaining railroads, between the termini and over the rout- described as follows:

"1. The line begins at Tucson, Pima county, Territory of Arizona, thence by the most favorable route in a northerly direction to a pass through the Tortilita mountains, thence in a northerly direction along the San Pedro river to its mouth; thence in a northeasterly direction along the Gila River valley to San Carlos; thence in a northerly direction to the San Carlos River valley, thence in
197 a northeasterly direction along the western slope of the White mountains to Fort Apache; thence in a northeasterly direction to the thirty-fifth (35th) parallel of north latitude, all of said line passing into and through the counties of Pima, Pinal, Graham, Gila and Apache of the Territory of Arizona, and the aggregate length of said road being about two hundred and ten miles.

Hugh Farley, 200 shares, value	$20,000.00
Wm. H. Culver, 200 shares, value	20,000.00
George Pusch, 200 shares, value	20,000.00
Jno. R. Culver, 200 shares, value	20,000.00
Joseph Goldtree, 200 shares, value	20,000.00
C. C. Stephens, 200 shares, value	20,000.00
L. C. Hughes, 200 shares, value	20,000.00
R. N. Leatherwood, 200 shares, value	20,000.00
P. R. Tully, 200 shares, value	20,000.00
J. C. Handy, 200 shares, value	20,000.00
C. P. Sykes, 200 shares, value	20,000.00

November 5th, A. D. 1882.

Stock to the amount of more than one thousand dollars for each and every mile of the above proposed railroad having been subscribed, we the subscribers thereto hereby appoint Hugh Farley and Wm. H. Culver, a committee of subscribers for the purpose of giving notice of a subscribers' meeting for the purpose of adopting articles of association as required by law, and for the further purpose of electing from said subscribers not less than five nor more than thirteen directors as required by law: Hugh Farley, Wm. H. Culver, George Pusch, J. P. Culver, Joseph Goldtree, C. C. Stephens, L. C. Hughes, R. N. Leatherwood, P. R. Tully, J. C. Handy, C. P. Sykes.

We hereby appoint the 21st day of November, A. D., 1882,
198 at ten o'clock a. m. at the office of Culver & Aram in Tucson,

Pima county, Arizona Territory as the time and place for the first subscribers' meeting.

HUGH FARLEY.
WM. H. CULVER.

We the undersigned subscribers as aforesaid admit the receipt of service of notice of said subscribers' meeting from said committee this 13th day of November, A. D. 1882.

C. P. SYKES,
J. GOLDTREE,
WM. H. CULVER,
L. C. HUGHES,
GEORGE PUSCH,
R. N. LEATHERWOOD,
HUGH FARLEY,
C. C. STEPHENS,
J. P. CULVER,
J. C. HANDY,
P. R. TULLY.

On this 21st day of November, A. D. 1882, at 10 o'clock a. m. at the office of Culver & Aram, in Tucson, Pima county, Arizona Territory, we the undersigned subscribers to the amount of two thousand and two hundred shares, amounting to the value of two hundred and twenty thousand dollars being an amount exceeding one thousand dollars per mile for each and every mile of the railroad herein and hereafter proposed having received seven days' notice as by law required from a committee of subscribers legally appointed do at this meeting adopt the following articles of association:

199

Article I.

The name of this incorporation shall be the Arizona Narrow Gauge Railroad Company.

Article II.

The number of years this incorporation shall continue in existence shall be fifty years.

Article III.

The amount of the capital stock of this corporation shall be three million dollars, which shall be divided into thirty thousand shares of one hundred dollars each, which sum is the actual contemplated cost of constructing the road herein proposed to be constructed together with the cost of the right of way, motive power and every other appurtenance and thing for the completion and running of said road as nearly as can be estimated by John P. Culver, of Tucson, Arizona Territory, a competent engineer whose estimate and report is annexed hereto and made a part hereof.

Article IV.

The number of directors to manage the affairs of the company shall be eleven and names of the first directors shall be Hugh Farley, Wm. H. Culver, George Pusch, J. P. Culver, Joseph Goldtree, C. C. Stephens, L. C. Hughes, R. N. Leatherwood, P. R. Tully, J. C. Handy & C. P. Sykes, who shall hold their office until others are elected as shall be provided by the by-laws of the company.

Article V.

The places from and to which the proposed road together
200 with the branches thereof, are to be constructed and the counties into and through which said road and branches are intended to pass and their length as near as may be are the same as set forth in the preceding statement of subscription — is made a part of these articles of association.

Hugh Farley, of Tucson, Arizona Ter. 200 shares value $2,000.00.
Wm. H. Culver, of Tucson, Arizona Ter. 200 shares value $2,000.00.
George Pusch, of Tucson, Arizona T'y 200 shares, value $20,000.00.
Jno. P. Culver of Tucson, Arizona T'y 200 shares value $20,000.00.
Joseph Goldtree of Tucson, Arizona T'y 200 shares value $20,000.00.
C. C. Stephens of Tucson, Arizona Ter. 200 shares value $20,000.00.
L. C. Hughes of Tucson, Arizona T'y 200 shares value $20,000.00.
R. N. Leatherwood of Tucson, Arizona T'y 200 shares value $20,000.00.
P. R. Tully of Tucson, Arizona T'y 200 shares value $20,000.00.
J. C. Handy of Tucson, Arizona T'y 200 shares value $20,000.00.
C. P. Sykes, Calabasas, A. T. 200 shares value $20,000.00.

Estimate of actual cost of constructing a railroad of three feet gauge along the line set forth in the foregoing articles of association, together with the cost of right of way, motive power, depots and stations, rolling stock, and other appurtenances and things for the completion and running of the road.

Estimate per Mile.

Right of way, station grounds and buildings	$300.00
Motive power	250.00
Cars of all kinds	210.00
Rails, fastenings and track-laying	6,300.00
Ties 2,640 per mile	1,300.00
201 Grading and bridgeing	5,100.00
Incidental and miscellaneous	400.00
Total cost per mile	$13,860.00
Total cost of 210 miles	2,910,600.00

I, John P. Culver, hereby certify that I am a civil engineer by occupation and profession that I have had examined the line of the road hereinbefore proposed and set forth and have estimated the actual contemplated cost of construction of said road together with the cost of right of way, motive power and every other appurtenance and thing for the *contemplation* and running of said road, and the actual contemplated cost as nearly as can be estimated is the sum of $2,910,600.

JNO. P. CULVER.

Filed in the office of the secretary of the Territory of Arizona, this 23rd day of November, A. D. 1882, at 3 o'clock p. m.

H. M. VAN ARMAN,
Secretary of Territory,
By F. S. INGALLS, *Ass't.*

202 II.

That the president of the Arizona Narrow Gauge Railroad Company mentioned in the act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," on April 27, 1883, gave information in writing to the chairman of the board of supervisors of Pima county, Territory of Arizona, that the said railroad company was ready to exchange bonds with the said county of Pima according to the provision of the said act approved February 21, 1883.

III.

That upon such information in writing being given to the chairman of the board of supervisors of Pima county, Territory of Arizona, by the president of the Arizona Narrow Gauge Railroad Company, the corporation of that name which filed its articles of association with the secretary of the said Territory on the 23d day of November, 1882, that the said railroad company was ready to exchange bonds with the said county of Pima, according to the provisions of the said act approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," the said chairman of the said board of supervisors called a meeting of the said board to be held within five days after the receipt of the said notification, namely, to be held at the office of the said board at the court-house on Monday, the 30th day of April, 1883, at ten o'clock a. m.
203 to take action on said notice and application.

IV.

That the board of supervisors of the county of Pima, Territory of Arizona, met at their office in the court-house at the county-seat of said county on Monday April 30, 1883, at ten o'clock a. m. pursuant to the call by the chairman of the said board issued April 27, 1883, made as prescribed in section 1 of the act of the legislature of the Territory of Arizona approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," to consider the application of W. H. Culver, president of the Arizona Narrow Gauge Railroad Company, for an exchange of bonds in accordance with the provisions of the said act. That the said board adjourned from time to time until May 5, 1883, on which day the following proceedings were had, as appears by the minute entries of the said board: "The board resumed the consideration of the application of the Narrow Gauge Railroad Company for exchange of bonds. After argument for and against the proposition, Supervisor Toole offered the following: Ordered, that the board, having duly considered the ap-

plication of the Narrow Gauge Railroad Company for an exchange of $200,000 of bonds, and being of the opinion that the said railroad company is not in position to give any guarantee that they intend in good faith to build said road; it is ordered that until said company do some act in accordance with the provisions of the law under
204 which they ask an exchange of bonds, their application be refused and denied. The motion not being seconded was not entertained. Supervisor Samaniego presented for the consideration of the board the following order: "Ordered $200,000 of the bonds of the county of Pima drawn in accordance with an act of the Legislative Assembly of the Territory of Arizona, entitled 'An act to promote the construction of a certain railroad,' approved the 21st day of February, A. D. 1883, be issued and that the same be placed in the hands of the county treasurer upon the Narrow Gauge Railroad Company giving bonds to the county of Pima in the sum of five hundred dollars, conditioned that if the above bonds are not exchanged in accordance with the provisions of said act for the bonds of the above-named railroad, that said company will repay the said county of Pima all expenses incurred in the issuance of said bonds; the bond to be approved by the board after submission to the district attorney as to form. The question being upon the adoption of the order, those voting — the affirmative were Supervisors Otis and Samaniego, those voting — the negative Supervisor Toole. So the motion passed and was adopted." That on May 19, 1883, the said board of supervisors of the county of Pima ordered that the clerk be instructed to prepare forms of bonds to be ready for the inspection of the board on May 21, 1883. That on May 21, 1883, the records of the board of supervisors of said county show that the clerk submitted forms of such bonds and
205 that the said board ordered them to be lithographed. That on August 2, 1883, the said board made the following order, to wit: "In the matter of exchange of bonds with the Arizona Narrow Gauge Railroad Company; ordered that the respective county officers required by law so to do, sign and seal said bonds, and thereupon the clerk of the board is especially instructed to deliver said bonds to the county treasurer, taking his receipt therefor." That there was filed with the clerk of said board August 3, 1883, over the signature of W. J. Osborne clerk, and signed J. C. McElliot, county treasurer, the following: "Tucson, A. T., August 18, 1883. Received of William J. Osborne, clerk of the board of supervisors of the county of Pima, two hundred (200) bonds of one thousand (1,000) dollars each, numbered from one to two hundred inclusive of the county of Pima, for issue to the Narrow Gauge Railroad Company of Arizona, as provided by law." That said bonds and coupons embraced bonds numbers one to one hundred and fifty inclusive, and the coupons thereon described in the petition in these mandamus proceedings. That on June 16, 1884, there was entered in the minutes of the said board of supervisors of Pima county, the following: Ordered that the chairman of the board be authorized when he shall deem it expedient, to institute proceedings for the recovery of the county bonds issued to the

Arizona Narrow Gauge Railroad Company and to stop the payment of the interest thereon. That on said June 16, 1884, there
206 was filed in the office of the clerk of the board of supervisors of said Pima county, Arizona, a paper signed William C. Davis, president of the A. & G. R. R. Co., and attested C. C. Stevens secretary, and addressed to the board of supervisors of said county as follows: "The A. & G. R. R. Co. by its president, W. C. Davis, hereby offers for reasons that are obvious and well understood by your honorable board, to the supervisors of Pima county, $50,000 of Pima County bonds now held by said corporation and accept in full payment therefor, Pima County warrants of the face value to the amount of $22,500 and the corporation bonds heretofore exchanged for said county bonds. This sum of $22,500 is about $1,000 less than the actual *bona fide* expenses of the said corporation in the construction of the said road to date." That there was filed on the same day with the said clerk and signed by the same man as president of the said railroad company, and addressed to the board of supervisors of Pima county, a paper to the effect that the said railroad company "hereby offers to release the county of Pima from all obligations to said Arizona Narrow Gauge Railroad Company under an act of the legislature of Arizona, approved February 21, 1883. The said railroad company hereby offers and proposes to return to the supervisors of the said county of Pima $50,000 in bonds of said county issued to said company by said supervisors under said act, and release said county from the transfer of their bonds with the said
207 company under and by virtue of the above-mentioned act. The reasons of the proposed release of the said county are inability of the said company to dispose of said bonds in the amount of $50,000 advantageously and to the benefit of the said company, greater than the consideration hereinafter mentioned, as a consideration asked from the said county of Pima for the above-mentioned release and retransfer of the said bonds of the said county. The said company proposes and offers to release the said county as aforesaid and retransfer to the said county the $50,000 in bonds of said county upon the said board of supervisors returning to the said company the $50,000 of bonds of said company now held by the said board of supervisors, and the further consideration of the issuance to the said railroad company by the board of supervisors of warrants of the said county of Pima in the amount of $18,500." That on November 7, 1884, the following minute entry appears in the proceedings of the said board of supervisors: "Ordered, all members voting 'Aye,' that the county treasurer be instructed not to pay any interest on the bonds issued by the county to the Arizona Narrow Gauge Railroad Company until he receive the further order of the board, and that the clerk transmit a copy of this order to the treasurer."

208 V.

That there is no evidence in the records of the board of supervisors or the office of the treasurer of said Pima county how the first $50,000

of bonds came into the possession of the Arizona Narrow Gauge Railroad Company. That the incorporators of the said railroad company had no way in which they could reasonably count on having this road built; that they had no funds promised or secured with which to complete the road at the time and no arrangement with any capitalists or syndicate by which the money was to be furnished to complete the road; that they did not expect to put in the money themselves and had no idea where they were to get it. That the company in 1883 had graded about five and a half or six miles and had purchased ties and timber for bridges, but had no rails on the part graded. That the company suspended work in 1883 and that work was not resumed till about August, 1886. That the company had made an offer to sell the first $50,000 of bonds of Pima county, and almost everybody in the company tried to sell them. That the treasurer of the company was one B. M. Jacobs, a banker in the city of Tucson, Arizona, and that he had tried through the usual channels to place the bonds in New York, San Francisco and other places, and could not find any purchasers. That the company sent an attorney East to negotiate the bonds, but he was not able to do so; that the treasurer of the railroad company made several applications to the treasurer of Pima county to pay the interest on these
209 bonds but he refused to pay any interest, and the railroad company never received any money from the county treasurer or from anybody else on these bonds. That there were past-due coupons on the bonds of Pima county in 1886 when the first $50,000 of bonds were turned over to one W. W. Walker, who was an agent of Coler & Co., and that no interest had been paid on the bonds.

VI.

That afterwards, to wit, on or about August 13, 1886, the treasurer of the said county of Pima upon proof of the fact that five miles of said railroad mentioned in the said act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," had been graded, laid with ties and iron, which proof was the certificate of the county surveyor to that effect, exchanged with the said president and with the said secretary of the said Arizona Narrow Gauge Railroad Company $50,000 of said bonds of the said county of Pima, for $50,000 of the said first-mortgage bonds of the said Arizona Narrow Gauge Railroad Company, the said bonds of the county of Pima being numbers 51 to 100 inclusive, and being part of the bonds described in the petition in these mandamus proceedings. It is further found as a matter of fact that at the time the said $50,000 of said Pima County bonds were thus delivered by the treasurer of said county, at least five miles of the said Arizona Narrow Gauge railroad
210 had been graded, laid with ties and iron and constructed as required by the said act approved February 21, 1883.

VII.

That afterwards, to wit, on or about August —, 1886, the treasurer of the county of Pima upon proof of the fact that a second and ad-

ditional five miles of the said Arizona Narrow Gauge railroad had been graded and laid with ties and iron, which proof was the certificate of the county surveyor to that effect, exchanged with the president and secretary of the said Arizona Narrow Gauge Railroad Company $50,000 bonds of the county of Pima, numbers 101 to 150 inclusive, for $50,000 of the first-mortgage bonds of the said Arizona Narrow Gauge Railroad Company, the said $50,000 bonds of the county of Pima being part of the bonds described in the petition in these mandamus proceedings. It is further found as a matter of fact that at the time the said third $50,000 of said Pima County bonds were thus delivered by the treasurer of said county, at least ten miles of the said Arizona Narrow Gauge Railroad had been graded, laid with ties and iron and constructed as required by the said act approved February 21, 1883. It is further found as a matter of fact that no more than ten or ten and one-half miles of the said road have ever been laid with ties and iron, and that no work was ever done on the said road except to lay ten miles with ties and iron as above stated and grade about twenty miles additional. It is also further
211 found as a matter of fact that no passenger or freight trains were ever run over said road, and that after the delivery of the third $50,000 of said Pima County bonds, all work and operations on said road were abandoned and never resumed. That the ten miles out of Tucson which were laid with ties and iron were ballasted except for a very little bit of the way. That the road was not very well graded and was not a well-made road. The earth was thrown up loose. It was a light sandy loam and did not hold. There was a certain grade for two or three hundred feet, and then there would be another grade and then at the end of that another grade.

VIII.

That the original stockholders of the road were not able to continue work on it after the grading done in 1883 and suspended all operations after that time. That in March, 1886, these original stockholders turned over all the assets of the road to one W. W. Walker, on his agreement to complete the road in accordance with the said act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," and in accordance with the original intent of the company; that said W. W. Walker and his associates, Coler & Co., who were a firm of bankers and brokers of New York city, took the stock of said Arizona Narrow Gauge railroad and elected a new board of directors and new officers; that said W. W. Walker did
212 not have sufficient means to build thirty miles of the said railroad and that Coler & Co. knew this fact; that said Walker was the representative and agent of said Coler & Co.; that Coler & Co. became stockholders of the Arizona Narrow Gauge Railroad Company on August 9, 1886, receiving one-third of the stock; that all the money for the building of the said ten miles and the grading of the twenty miles additional, amounting to $52,900.42,

was transmitted by Coler & Co. to the Bank of Tucson for the credit of W. W. Walker, agent, and was all expended under the supervision and orders of one C. S. Coler, who was a nephew of W. N. Coler, and who was sent from the East to represent said W. N. Coler and to act as cashier and to sign all checks for all funds paid out in the construction of the said road. That said Coler & Co. made a contract with W. W. Walker in which Coler & Co. agreed to finance and build the first thirty miles of the said road and to pay over moneys as needed for construction expenses, but that after Coler & Co. had received $150,000 of Pima County bonds, being the 150 bonds involved in these mandamus proceedings, said Coler & Co. refused to proceed further on the lines originally agreed upon. That the said second and third $50,000 of said Pima County bonds were received from the county treasurer of Pima county by W. H. Culver, who was the president, and Charles E. Walker who was the secretary, of said Arizona Narrow Gauge Railroad Company, and were by said Charles E. Walker packed, sealed and
213 delivered to the express company for shipment to Coler & Co. in New York, and that the first installment of $50,000 Pima County bonds had been sent to Coler and Co. before May 18, 1886. That Coler & Co. agreed to pay for these bonds the price of 74¼ cents on the dollar and to pay the money over as needed for construction expenses, but Coler & Co. never rendered any account showing the amount of money advanced by them and for what purposes. That before Coler & Co. advanced any moneys in the work done on the ten miles which were laid with ties and iron and the twenty miles which were graded, W. N. Coler came to Tucson in person and investigated the condition of affairs and also sent an agent, one J. Alden Gaylord, who in February or March, 1886, went to Globe, Arizona, over the route of the proposed road in order to examine into the feasibility of it and whether it would pay and that said Gaylord on May 11, 1886, wrote to W. N. Coler & Co. that "in accordance with your instructions" he had made a trip to Arizona in March and examined into the "particulars of the issues of $200,000 of bonds to the Arizona Narrow Gauge Railroad Company," and on March 27, 1886, addressed to the chairman of the board of supervisors of Pima county, the following letter:

"NEW YORK, *March* 27, 1886.

Hon. J. S. Mansfield, Tucson, chairman board of supervisors, Pima county, Arizona Territory.

MY DEAR SIR: This morning I wired you as follows: 'My
214 report has been favorably considered. Negotiations just closed. Building of your railroad is now a fixed fact. I congratulate you,' all of which I hereby confirm. It gave me equally as much pleasure to send the above as I know it did you to receive it. I have great faith in the almost unbounded resources of your country, and the narrow-gauge R. R. will be an important factor in developing them. It will in due course bring increased wealth, commerce and population to Tucson and Pima county, if your citizens do their part in encouraging these great commercial blessings,

and of that I do not have the slighest doubt. My friends have ample means to build the road up to the 'thirty-mile post,' and it is safe for me to say that the work will be pushed vigorously, and the R. R. will be finished there during the summer. Beyond that point (thirtieth mile post) you can readily understand that the extentions of it northwards to the mouth of the San Pedro (and still better to catch the immense carrying trade of Globe City) will depend very largely on the liberality and wisdom of the people of Pinal and Gila counties to grant aid, and see the necessity of doing so promptly, which I feel assured they will do nobly when the proper time arrives. With this object in view, I trust you and the members of the board of supervisors will do all in your poser officially and as good citizens to promote and prepare the way for this most important action, which is not only so vitally momentous for the future prosperity of Pinal and Gila, but your own county as well.

215 Possibly I may be offered a directorship in the narrow gauge by my friends who are building it, and in that event I may be out and visit your hospitable city this winter coming, or before, and I feel that it almost goes without saying that you will do all you consistently can to assist me in this matter.

In conclusion, I desire to thank you, the board, and all the citizens of Tucson and Pima for your kindness so cordially extended to me, by one and all, during my recent sojourn, and to assure you that I appreciated it most sincerely, and will never lose an opportunity to tell the truth here in the East (where so much misapprehension seems to exist), about the great resources of your country, as well as the courtesy, honesty and enterprise of its citizens.

With great respect, I have the honor to be, yours

Very truly, J. ALDEN GAYLORD."

IX.

That before the second and third delivery of $50,000 each of bonds of Pima county was made to the contractor, Coler & Co. were stockholders of the said Arizona Narrow Gauge Railroad Company and were holding and owning one-third of the stock of said railroad company, and at the time of the delivery of said $100,000 of said bonds the said contractor, one William W. Walker, who was engaged in constructing the said railroad, was the agent of William

216 N. Coler Sr., who was trading in the name of W. N. Coler & Co. That before the said W. N. Coler & Co. acquired the said bonds, they made inquiries of many persons, business men, officials, and others in Arizona recommending the said bonds, and the said W. N. Coler & Co. were informed in said letters that a road from Tucson to Globe would be a paying enterprise and that if said road were built it would in all probability be a paying investment. And said W. N. Coler & Co. before the bonds were delivered to them or any moneys had been advanced by them for construction work on the said railroad, were fully informed as to all the facts connected with the issuance of the first $50,000 of bonds, and that the county of Pima had refused to pay interest on same and that the original stockholders of the said Arizona Narrow Gauge Railroad Company

were unable to sell the $50,000 of bonds then in the possession of the treasurer of said Arizona Narrow Gauge Railroad Company and that the said company had abandoned the idea of doing any more work on the said railroad.—That after the said bonds were delivered to W. N. Coler & Co. he sold the same to various parties at prices ranging from 94 cents on the dollar, to par. That one John Green, holder of one of said bonds, Theodore Hill, holder of one of said bonds, Eva May Smith, holder of one of said bonds, Steven Tompkins holder of one of said bonds, and Emma L. Zabriskie, holder of four of said bonds have testified in this case that they bought the same without any knowledge of any defect and that they paid par for said bonds; that as the coupons came due on all
217 of the said $150,000 of bonds and after Pima county had refused to pay any interest on any of said bonds, Coler & Co. advanced to the holders of the coupons on all of said bonds the amount of said coupons as they became due and retained and kept the said coupons and all of them, and that this was continued to the year 1896 and that all of the said coupons sought to be funded in this case are owned by the firm of Coler & Co. That the coupon falling due July 1, 1887, on the said bonds of Pima county, was sent by Coler & Co. to the treasurer of Pima county for collection, and that the coupons falling due on said date from a number of these bonds were protested July 25, 1887, and the coupons falling due January 1, 1888, were also protested, and that Coler & Co. continued after the protest of said coupons to advance to the holders of the said bonds the amount of all the other coupons as they fell due semi-annually, all of which said coupons were retained and kept by Coler & Co. and are now the property of said firm. That prior to January 1, 1887, the firm of W. N. Coler & Co. was composed of W. N. Coler; that after January 1, 1887, and up to November 1, 1898, it was composed of W. N. Coler, Sr., and W. N. Coler, Jr., and that after November 1, 1898, Mr. Frank W. Coler became a member of the firm. That the said firm of W. N. Coler & Co. are now the owners and holders of thirty of the said Arizona Narrow Gauge Railroad bonds, numbers 101 to 130 inclusive, and that the
218 same were bought from the executors of one Elizabeth B. Voorhees under the following agreement:

"April 11, 1899.—Sold to W. N. Coler & Co. at private sale thirty, seven per cent. bonds, par $1,000 each known as the Arizona Narrow Gauge bonds, being numbers 101 to 130 inclusive, issued by Pima county, Arizona, July 1883, and repudiated by the county shortly after their issue. They have been the subject of litigation for several years which is still pending. Also five 6 % par value $1,000 each, issued by the city of Langton, Elk county, Kansas, being numbers 1 to 5 inclusive, for all of which we receive $11,000. Note: The Arizona Narrow Gauge Railroad bonds were in the possession of Coler & Co., who claimed a lien upon them for *pro rata* shares of moneys advanced by them and expenses incurred in carrying on the litigation to establish their validity together with other bonds of the same issue. Her *pro rata* share amounted to $14,000.

The Pima County bonds were in the actual custody of Coler & Co. April 11, 1899, the date of their sale as heretofore stated in Schedule A. Coler & Co. claimed a lien upon them which amounted to $14,000 or more for expenses of litigation in Arizona and elsewhere,"

which agreement was signed and sworn to by the executors of the said Elizabeth B. Voorhees; that the said firm of W. N. Coler & Co. is also the holder and owner of seven more of the said bonds issued by Pima county; that W. N. Coler, Jr., is the holder and owner of sixteen of the said bonds of Pima county, and that when he purchased them
219 he knew that the suit of Charles Edward Lewis *vs.* Pima County had been decided by the Supreme Court of the United States, and that at the time of the purchase of the said sixteen bonds by William N. Coler Jr. there was no market for them owing to the fact that they had been declared invalid in the said suit of Lewis *vs.* Pima County. That the North American Loan & Trust Company is the holder and owner of five of said bonds of Pima county, which they acquired by an exchange of other bonds on April 1, 1896; that at such date one Leonard H. Hole, an attorney of law, was the president of said North American Loan & Trust Company and that said Hole knew of the result of the suit of Charles Edward Lewis against Pima County shortly after the decision was rendered in said case in 1894, and that on or about April 1, 1896, said Hole knew by report that work had been stopped on the Arizona Narrow Gauge railroad; that James L. Utter, one of the petitioners herein, is engaged in the business of buying and selling municipal bonds and that he bought certain of these Pima County bonds from Coler & Co. and sold the same to other parties, and that the customers to whom said Utter sold the bonds delivered the coupons to Utter as said coupons fell due, and Utter paid the money on said coupons, and sent said coupons to Coler & Co., and received from Coler & Co. the money on all of said coupons down to about 1895, or 1896.

220 X.

That some of the purchasers of the said bonds from W. N. Coler & Co. sold and disposed of the same to other persons and that some time after the passage of the act of Congress of June 6, 1896, the persons who then held all the said $150,000 bonds and coupons pertaining thereto, including among others, Elizabeth B. Voorhees, one of the petitioners in these proceedings, who owned subject to the lien of Coler & Co. thirty of the said Pima County bonds, numbers 101 to 130 both inclusive, and James L. Utter, who owned absolutely in his own right four of said bonds, numbers 3, 11, 66 and 40, placed all these 150 bonds and the coupons pertaining thereto in the possession of the firm of W. N. Coler & Co., accompanied by the following written authority, signed by said persons, to wit:

"Messrs. W. N. Coler & Co., New York city.

GENTLEMEN: We herewith enclose you bonds number — amounting to $— wi*ll* full authority to deal with them in the same manner

as all other bonds of said issue placed in your hands, and with authority to change the form of said indebtedness in such manner as you deem to the best interests of all bondholders, and accept in lieu thereof such new securities as in your judgment may be best, and we also agree to pay our proportional share of any and all expenses incurred by you in connection with this matter, it being
221 understood however that nothing in this shall be construed as an obligation on our part to assume any expense whatever in the event of your failure to secure a settlement or enforcement of this indebtedness.

Yours truly,"

That all the moneys expended in the litigation in Arizona over the coupons of said bonds and the other expenses in connection with efforts to validate these bonds have been advanced solely by Coler & Co. and that the other owners of the bonds never brought any suit on the coupons and never joined in defraying the expenses of any suit.

The persons who were at that time the owners of the said bonds and who thus delivered their bonds to W. N. Coler & Co. who in turn delivered them to James L. Utter and Elizabeth B. Voorhees and their attorneys, to be presented by them for refunding, were as follows, to wit:—

222

Albert Brown,	bond	No.	1 and 5.....	$2,000.00
B. V. Tompkins,	"	"	2 and 138.....	2,000.00
J. L. Utter,	"	"	3, 11, 37, 40, 65, 66, 67, 68, 92, 131, 132,	11,000.00
Jasper Westervelt,	"	"	4.....	1,000.00
Theodore Hill,	"	"	6.....	1,000.00
Steve Tompkins,	"	"	7.....	1,000.00
John Morehouse,	"	"	8, 9, 12, 13, 14.....	5,000.00
T. E. Packer,	"	"	10, 18, 19, 21, 63, 82, 94..	7,000.00
Orlin Champlin,	"	"	15.....	1,000.00
L. O. E. Noyes,	"	"	16.....	1,000.00
L. B. Seaver,	"	"	17, 51, 52, 96.....	4,000.00
George Parker,	"	"	20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36—	16,000.00
Est. Grace C. Brown,	"	"	38, 53, 54, 55, 56, 57.....	6,000.00
A. R. Duryee,	"	"	39.....	1,000.00
Esther Graham,	"	"	46.....	1,000.00
E. L. Zabriskie,	"	"	47, 48, 49, 50.....	4,000.00
M. L. Brown,	"	"	58, 59, 60, 61, 62.....	5,000.00
John Green,	"	"	64.....	1,000.00
E. P. Atwood,	"	"	69, 70, 71, 72, 73.....	5,000.00
W. N. Coler, Jr.,	"	"	74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 88, 89, 90—	16,000.00
J. S. Heath,	"	"	91.....	1,000.00

J. J. Thomas,	bond No. 93.....		$1,000.00
Dime Savings Bank, Norwich, Conn.,	"	" 95.....	1,000.00
Leonard Smith,	"	" 97.....	1,000.00
J. Rishmore,	"	" 98.....	1,000.00
Hanry Chapel,	"	" 99.....	1,000.00
C. F. Spaulding,	"	" 100.....	1,000.00
E. B. Voorhees,	"	" 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130,	30,000.00
North American Loan & Trust Company,	Nos. 133, 134, 135, 136, 137...		5,000.00
W. N. Coler & Co.,	"	" 139, 140, 141, 142, 143, 144, and 145,	7,000.00
A. L. Bosworth,	"	" 146, 147, 148, 149, 150...	5,000.00
J. L. Austen,	"	" 41, 42, 42, 44, 45.....	5,000.00
			$150,000.00

223 That bonds 139, 145 inclusive now held by Coler & Co. were acquired by that firm prior to June 6, 1896, at a time when said bonds had no market value, and it is further found that except Elizabeth B. Voorhees, the other owners of these bonds have never been charged with any moneys advanced by Coler & Co. in regard to such bonds or expenses incurred by Coler & Co. in carrying on any litigation.

That W. N. Coler & Co. acting under and pursuant to the said authority transferred and delivered all the said bonds and coupons to James L. Utter and Elizabeth B. Voorhees, and to their attorneys Leonard H. Hole and Barnes & Martin, in order that the said bonds and coupons might be presented to the board of supervisors of the county of Pima, and to the board of loan commissioners of the Territory of Arizona, for refunding under the provisions of the act of Congress of June 6, 1896. That it was the express understanding that when the said bonds were refunded the new refunding bonds should be delivered to the several holders of the old bonds and coupons *pro rata*, and that the holders of the old bonds and coupons should bear *pro rata* the charges and expenses of such presentation, but that Coler & Co. have advanced all the moneys for expenses connected with all the litigation over these bonds and the holders and owners of the old bonds are not to assume any expense in case the said bonds are not refunded. It was also the express understanding and agreement that the said James L. Utter and Elizabeth B. Voorhees and their attorneys
224 had full authority to bring any suit or suits or mandamus proceedings which might be necessary in order to enforce the refunding of said bonds. The said James L. Utter and Elizabeth B. Voorhees expressly assented to this understanding and agreement

and trust as to all the bonds and coupons. Pursuant to the said understanding and agreement and trust as to all said bonds, all the said bonds and coupons were forwarded by express to Leonard H. Hole, attorney for said James L. Utter and Elizabeth B. Voorhess, and were by him received and taken to Arizona, and he, together with Barnes & Martin, attorneys-at-law in Arizona, presented said bonds and coupons to the board of supervisors of the county of Pima, and made a demand in writing on the said board of supervisors of said county that they report to the loan commission of the Territory of Arizona the said outstanding bonds and coupons and the indebtedness represented thereby, and that on the said board of supervisors failing to comply with their demands the said Leonard H. Hole and said Barnes & Martin presented the said bonds and coupons to the loan commissioners of the Territory of Arizona and made the demand upon them dated Phœnix, Arizona, December 14, 1896, which is set forth as Exhibit A to the petition in the pleadings in these mandamus proceedings, and on the refusal of the said loan commissioners to issue refunding bonds as demanded, the present mandamus proceedings were, pursuant to said understanding, and agreement, begun and instituted in this court on the
225 31st day of December, 1896. That the said bonds and coupons on which these mandamus proceedings are brought, are as follows, to wit: (Form of bond, serial number omitted)

One thousand dollars. UNITED STATES OF AMERICA, *Territory of Arizona, County of Pima.* $1,000.00.

The County of Pima, in the Territory of Arizona, for value received promises to pay to the Arizona Narrow Gauge Railroad Company or bearer at the office of the treasurer of said county, in the city of Tucson, on the first day of July, A. D. one thousand nine hundred and three (1903) the sum of one thousand dollars, in lawful money of the United States, with interest thereon at the rate of seven per cent. per annum. Said interest payable at the office of the treasurer of Pima county, semi-annually, on the first day of January and first day of July in each year, on presentation and surrender of the interest coupons hereto attached.

This bond is issued by the board of supervisors of said county of Pima under and by virtue of an act of the legislature of Arizona, entitled An act to promote the construction of a certain railroad, passed by the Legislative Assembly of the Territory of Arizona, and approved by the governor thereof the 21st day of February, A. D. 1883; and this bond is one of a series of two hundred issued in pursuance of said act, and exchanged for a like number of bonds
225½ of said railroad company of like amounts, bearing like interest, and running like time as the bonds of which this is one.

In witness whereof the said county, by its board of supervisors has caused this bond and the coupons hereto attached, to be signed by the chairman of the board of supervisors, and countersigned by the clerk of said board, and by the county recorder

of the county of Pima; and the said clerk has affixed hereto the seal of the said county; and the said recorder has affixed hereto the seal of the said county recorder's office this first day of July, A. D. 1883.

JAMES H. TOOLE,
Chairman Board of Supervisors.
WILLIAM J. OSBORNE,
Clerk Board of Supervisors.
CHAS. R. DRAKE,
County Recorder.

That petitioners own and hold one hundred and fifty of said bonds, numbered from 1 to 150 both inclusive.

That there are at present attached to each of said 150 bonds seven interest coupons not yet due, numbered 34, 35, 36, 37, 38, 39, & 40, each for the sum of $35.00 and to become due as follows, to wit:

Coupon No. 34, July 1st, 1900.
Coupon " 35 January 1st, 1901.
Coupon " 36 July 1st, 1901
Coupon " 37 January 1st, 1902
Coupon " 38 July 1st, 1902
Coupon " 39 January 1st, 1903
Coupon " 40 July 1st, 1903.

That the form of each of said coupons, except as to number
226 of bond, number of coupon, and date of maturity, is as follows, to wit:

Pima County Bond.

Coupon number —.

On the 1st day of ——, A. D. 1—, the County of Pima in the Territory of Arizona, will pay to the bearer, at the county treasurer's office, at Tucson, thirty-five dollars ($35.00) being interest due on bond numbered —.

JAMES H. TOOLE,
Chairman Board of Supervisors of Pima County.
WILLIAM J. OSBORN,
Clerk Board of Supervisors of Pima County.
CHAS. R. DRAKE,
Recorder of Pima County.

That petitioners also own and hold three thousand eight hundred and ninety-one (3,891) like coupons, each for the sum of $35.00 clipped from said 150 bonds, and being coupons numbered 8 to 33, both inclusive from each of said 150 bonds, and due respectively:

Coupon No. 8 July 1st, 1887.
Coupon " 9 January 1st, 1888.
Coupon " 10 July 1st, 1888.
Coupon " 11 January 1st, 1889.
Coupon " 12 July 1st, 1889.

Coupon " 13 January 1st, 1890.
Coupon " 14 July 1st, 1890.
Coupon " 15 January 1st, 1891.
Coupon " 16 July 1st, 1891.
Coupon " 17 January 1st, 1892.
Coupon " 18 July 1st, 1892.
Coupon " 19 January 1st, 1893.
Coupon " 20 July 1st, 1893.
Coupon " 21 January 1st, 1894.
Coupon No. 22 July 1st, 1894.
227 Coupon " 23 January 1st, 1895.
Coupon " 24 July 1st, 1895.
Coupon No. 25 January 1st, 1896.
Coupon " 26 July 1st, 1896.
Coupon " 27 January 1st, 1897.
Coupon " 28 July 1st, 1897.
Coupon " 29 January 1st, 1898.
Coupon " 30 July 1st, 1898.
Coupon " 31 January 1st, 1899.
Coupon " 32 July 1st, 1899.
Coupon " 33 January 1st, 1900.

Except the following coupons, which are not produced by petitioners, to wit:

Coupons No. 14 from bonds Nos. 84, 85, 86, 88 and 90 due July 1, 1890.
Coupon No. 15 from bond No. 17, due January 1, 1891.
Coupon No. 22 from bond No. 93, due July 1, 1894.
Coupon No. 24 from bond No. 19, due July 1, 1895.
Coupon No. 25 from bond No. 19, due January 1, 1896.

228 XI.

That after the contract entered into with W. W. Walker and the transfer by the original stockholders of the Arizona Narrow Gauge Railroad Company of all the assets of the company including the first $50,000 of bonds of Pima county, there was no money in the treasury of the said Arizona Narrow Gauge Railroad Company, and the moneys for the work done on the said ten miles after the contract with said W. W. Walker as agent of Coler & Co. were not disbursed by the treasurer of the Arizona Narrow Gauge Railroad Company, but were all paid out by C. S. Coler as the representative and disbursing agent of W. N. Coler & Co. That the said Arizona Narrow Gauge Railroad Company never paid any interest on the bonds of said railroad company held by Pima county, and that the said Arizona Narrow Gauge Railroad Company never had any money with which to pay such interest and that all the said bonds of said railroad company held by Pima county were at all times and now are worthless. That for one year after 1886 taxes were paid on the property of the Arizona Narrow Gauge Railroad Company by W. N. Coler & Co., but that no taxes were paid after that time, and that W. N. Coler & Co. were notified that the taxes were unpaid and were notified of everything going on in Tucson.

229 XII.

That the said first-mortgage bonds of the said Arizona Narrow Gauge Railroad Company which were exchanged for the $150,000 bonds of Pima county were duly made and executed by the said company, were secured by deed of trust or mortgage to at least two trustees of all the property, real and personal, owned by said railroad at the time of the issuance of said bonds, or might thereafter be acquired, including also all franchises and privileges of whatsoever kind or nature, and which said deed of trust or mortgage was the first made of or on said property, and said bonds of said company were issued in the name of said company, and were made payable to bearer twenty years after date, and have interest coupons thereunto attached, and were made payable both principal and interest at the office of said company in the city of Tucson, in the county of Pima, and said deed of trust or mortgage provided that no more bonds than to the amount of $13,000 per mile to be secured by said deed of trust or mortgage should be issued by said railroad company, and the said first-mortgage bonds of said railroad company were likewise in all other respects made, issued and delivered in full conformity to all the provisions of the said act of the legislature of the Territory of Arizona approved February 21, 1883, entitled "An act to promote the construction of a certain railroad."

March 22, 1901.

WEBSTER STREET,
Chief Justice.

230 RICHARD E. SLOAN,
Asso. Justice.

FLETCHER M. DOAN,
Asso. Justice.

GEO. R. DAVIS,
Asso. Justice.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al. vs.* B. J. Franklin, *et al.* Findings of fact. Filed April 2nd, 1901. Thomas Grindell, clerk. By Angie B. Parker, deputy.

231 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Plaintiff-,
vs.
B. J. FRANKLIN ET AL., Defendants. } No. 546.

Motion for a Rehearing.

Come now defendants and move the court to grant a rehearing of this cause, and in support of such motion represent—

1. That the decision herein is in conflict with the previous decisions of this court in the cases of Schuerman *et al.*, *v.* Territory 60 Pac., 895, and Gage *v.* McCord, 59 Pac., 99.

2. That the decision is in conflict with the decisions of the Supreme

Court of the United States in the case of Miners' Bank *v.* Dubuque, 12 How., 107, and of the various courts following such decision.

3. That the decision herein holding that the funding law of Arizona as set out in the Revised Statutes of 1887, is superseded by the congressional act of June 25, 1890, so far as the court holds that the loan commissioners did not continue under the authority of the Arizona legislature, is in conflict with the decisions of the Supreme Court of the United States in Wood *v.* U. S., 16 Pet., 363; Pac. Mail S. S. Co., *v.* Joliffe, 2 Wall., 450; Chicago Milwaukee & St. Paul
232 R'y Co., *v.* U. S., 127 U. S., 406; Bear Lake Co. *v.* Garland, 164 U. S., 12 and Utter *v.* Franklin, 171 U. S., 416.

4. That the decision herein is in conflict with the provisions of the act of the Twelfth Legislative Assembly of the Territory of Arizona, approved February 21, 1883, entitled "An act to promote the construction of a certain railroad."

5. Because the court did not grant defendants an opportunity to be heard orally in this case, and because the importance of the question involved is worthy of an oral presentation.

ROCHESTER FORD,
Of Counsel for Defendants.

Service of copy of foregoing motion is hereby acknowledged and service of any other copy by the clerk of the supreme court of Arizona or the sheriff of Pima county, is waived.

BARNES & MARTIN,
Attorney for Plaintiffs.

Dated, Tucson, Arizona, April 3, 1900.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al.*, plaintiffs, *vs.* B. J. Franklin *et al.* defendants. Motion for a rehearing. Filed April 4th, 1901. Thomas Grindell, clerk. By Angie B. Parker, deputy.

233 In the Supreme Court of the Territory of Arizona.

UTTER ET AL., Plaintiff-,
vs.
FRANKLIN ET AL., Defendants.

Memorandum on Findings of Fact and Judgment.

The findings presented by defendants were prepared with scrupulous regard to the evidence, and it is respectfully submitted that the statement of plaintiffs that our findings are contrary to the weight of the evidence is wholly erroneous. There is not one finding or any part of any finding that is not based directly on the evidence, and there is nothing in the findings that is not material according to respondents' theory of the case. It would seem to be manifestly just that all facts which respondents deem to be material should be incorporated in the findings for the benefit of the appellate court. Nor is it true, as we submit that to adopt these

findings would be inconsistent with the decision of the court, and this is true as above stated, because the findings fully and honestly represent the substance of the evidence. Plaintiffs attempt to get the court to find as a fact, that the bonds were *exchanged in good faith*, etc. We submit that the facts should be found and that the question of good faith is a legal
234 conclusion from the facts, and is properly incorporated in the judgment of the court rather than in the findings of fact. The findings of plaintiffs are worded as it seems to us with the idea of preventing respondents from having any benefit at all from the evidence. If the court fails to embody the facts in its findings but finds only a conclusion of law, there will be nothing for the appellate court to pass on as to whether the conclusion of law is justified by the findings.

If respondents findings are taken and compared with the abstract of the evidence it will be seen that they follow the evidence and contain nothing not set out in the evidence and that they contain a summary of all the evidence. On reading the findings submitted by plaintiffs it seemed to the undersigned that if they were adopted, they would pretty effectually cut off respondents from any benefit in the appellate court based on the facts of this case.

As to the judgment. Plaintiffs ask for interest on interest on the coupons. These bonds and coupons up to the date of the refunding act of 1896 were void and worthless. Pima county did not up to that time owe anything, and the treasurer could have been enjoined under the decision in Lewis *v.* Pima County from paying any of the coupons. Under this state of the law it seems to be clearly manifest that interest cannot be charged on coupons which themselves could not be paid. Interest is chargeable on obligations which are valid and past due, but none of these coupons were valid obliga-
235 tions until the curative act of 1896. For this reason we submit that it would not be lawful to allow any interest at any rate before 1896. If interest were allowed on these coupons on the theory that they were due, then on the same theory they would be barred by the statute of limitations.

Respectfully submitted.

ROCHESTER FORD,
Of Counsel for Respondents.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter *et al.*, plaintiffs, *vs.* B. J. Franklin *et al.*, respondents. Memorandum on findings of fact. Filed May 31, 1901, Thos. Grindell, clerk.

236 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
BENJAMIN J. FRANKLIN ET AL., Respondents. } Motion to Reform Judgment.

Come now respondents herein, by their counsel, and move the court to reform and modify its judgment herein so that there shall

be funded only the bonds proved to be owned by the plaintiffs herein, to wit: eleven bonds owned by J. L. Utter and thirty bonds owned by Elizabeth B. Voorhees, and in support of this motion respondents show to the court that all the bonds herein sought to be funded were at the solicitation of the firm of Coler & Co. placed in the hands of said firm under letters of authority as follows; as shown by the testimony herein:

Messrs. W. N. Coler & Co., New York city.

GENTLEMEN: We herewith enclose you bonds No. — amounting to $— with full authority to deal with them in the same manner as all other bonds of said issue, placed in your hands and with authority to change the form of said indebtedness in such manner as you deem to the best interest of all the bondholders, and accept in lieu thereof such new securities as in your judgment may be best, and we also agree to pay our proportionate share of any
237 and all expenses incurred by you in connection with this matter, it being understood however that nothing in this shall be construed as an obligation upon our part to assume any expense whatever in the event of your failure to secure a settlement or enforcement of this indebtedness.

Yours truly,

And respondents further represent in support of this motion that all of the one hundred and fifty bonds and coupons were accordingly placed in the hands of Coler & Co. under this authority.

And respondents further submit in support of this motion that the said agreement between the bondholders and Coler & Co. was one whereby said Coler & Co. agreed to defray all the expenses connected with said bonds and the holders of said bonds were not to defray any of said expenses in the event of a failure to secure a settlement of such indebtedness, and that such agreement upon the part of Coler & Co. was illegal and void, and that neither Coler & Co. or James L. Utter or Elizabeth B. Vorhies acquired by virtue of said agreement or otherwise any title to any of said bonds not individually owned by them on which they could bring this action.

Wherefore, respondents move.

ROCHESTER FORD,
Of Counsel for Respondents.

(Endorsed:) No. 546. In supreme court, Territory of Arizona. James L. Utter *et al.*, petitioners, *vs.* B. J. Franklin *et al.*, respondents. Motion to reform judgment. Filed June 1st, 1901. Thos. Grindell, clerk. Copy of this motion acknowledged June 1, 1901. B. & M., att'y- for petitioners.

238 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, WESLEY ALbright and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs, Petitioners,
against
B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. Bruce, Secretary, Loan Commissioners of the Territory of Arizona, Defendants. } Order.

This cause coming on further to be heard; and the plaintiffs and petitioners appearing by William H. Barnes, their attorney, and the Loan Commissioners of the Territory of Arizona, to wit: N. O. Murphy, governor; George W. Vickers, auditor; and Charles H. Akers, secretary, appearing by Charles F. Ainsworth, attorney general, and the said cause having been argued by the respective counsel for the petitioners and defendants, and submitted to the court upon the petition for writ of mandamus filed herein on or about the 31st day of December, 1896, and Exhibit A thereto attached, and the answer and response to the said petition filed herein on or about the 19th day of January, 1897, and the demurrer to the second defense of the said defendants in said answer and response, which de-
239 murrer was filed herein on or about the 19th day of January, 1897, and upon all the proceedings in this cause, including the mandate of the Supreme Court of the United States, and the court having considered the same, and being fully advised in the premises, it is

Considered, ordered and adjudged that the said plaintiffs and petitioners, to wit: the said James L. Utter, and the said George Albright, Wesley Albright and William H. Maginnis, as executors of the last will and testament of Elizabeth B. Voorhies, deceased, are entitled to a writ of mandamus as in said petition prayed; and that by law it is the duty of the defendants, the said Loan Commissioners to provide for redeeming and refunding of the said county indebtedness, and to issue the bonds of the Territory for said indebtedness in redemption of the said county bonds, coupons and interest; and that on the 12th day of December, 1896, the plaintiffs and petitioners made demand on the loan commissioners of the Territory of Arizona to issue bonds as provided by law in exchange for said county bonds, coupons and interest as aforesaid, with which demand the said loan commissioners unjustly refused to comply, to the injury of the said plaintiffs and petitioners, as appears by the said petition and Exhibit A thereto and the proceedings in this cause.

Further considered, ordered and adjudged that a peremptory writ of mandamus do issue, directed to N. O. Murphy, governor; George W. Vickers, auditor; and Charles H. Akers, secretary; the
240 present loan commissioners of the Territory of Arizona, being successors in office to respondents Franklin, Leitch and Bruce, and their successors in office as such loan commissioners, commanding them, upon the tender by the plaintiffs of the $150,000.00 of

bonds of the county of Pima described in the said petition, bearing date on or about the 1st day of July 1883, with the coupons then thereto attached, to make, issue and deliver to the said petitioners negotiable coupon bonds (or to their attorney), of the Territory of Arizona as provided in the acts of Congress entitled "An act approving with amendments the funding act of Arizona," approved June 5th, 1890; also the act of Congress, entitled "An act to amend an act entitled 'An act approving with amendments the funding act of Arizona,' approved June 25, 1890," approved July 13, 1892; also the act of Congress, entitled "An act to amend section 15 of an act approving with amendments the funding act of Arizona, approved June 25, 1890," approved August 3, 1894; also the act of Congress, entitled "An act amending and extending the provisions of an act of Congress, entitled 'An act approving with amendments the funding act of Arizona,' approved June 25, 1890, and the act amendatory thereof and supplemental thereto, approved August 3, 1894," approved June 6, 1896; such bonds to be made, issued and delivered to the petitioners or their attorney in exchange for the said $150,000 of bonds of the county of Pima described in said petition, and for the accrued and unpaid interest thereon, upon
241 the surrender of the said bonds and all unpaid coupons thereto attached, or for so many of said bonds and interest as shall be offered to the loan commissioners by the petitioners or their attorney.

Dated March 22, 1901.

WEBSTER STREET,
Chief Justice.
RICHARD E. SLOAN,
Associate Justice.
FLETCHER M. DOAN,
Associate Justice.
GEO. R. DAVIS,
Associate Justice.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. Jas. L. Utter, *et al.*, *vs.* Loan Commissioners. Judgment. Recorded Book 4, page- 550–552. Filed June 1, 1901, Thos. Grindell, clerk.

242 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased,
v.
BENJAMIN J. FRANKLIN.
} Assignment of Errors.

Come now the defendants and appellants, N. O. Murphy, C. H. Akers and J. W. Vickers and The Loan Commissioners of the Territory of Arizona, by Hon. C. F. Ainsworth, attorney general of Ari

zona, their attorney, and say that in the record and proceedings in the above-entitled cause there is manifest — in this to wit:

I.

That the loan commission of Arizona had been abolished by act No. 32 of the Twentieth Legislative Assembly of the Territory of Arizona, which became a law on March 13, 1899, prior to the judgment herein, and that at the date of such judgment there was no loan commission and no loan commissioners against whom any judgment could be rendered or enforced.

II.

That before the rendition of the judgment herein, of the original defendants herein, Benjamin J. Franklin had departed this life, and the other defendant-, C. M. Bruce and C. P. Leitch had long
243 since ceased to be secretary and auditor, respectively, of the Territory of Arizona.

III.

That N. O. Murphy, C. H. Akers and J. W. Vickers, who are now the governor, secretary and auditor of the Territory of Arizona, were never made parties to this proceeding, and that the judgment against them, as loan commissioners, is erroneous, because the said loan commission was abolished on March 13, 1899, and that it has not been in existence since that day, and said N. O. Murphy, C. H. Akers and J. W. Vickers have not been loan commissioners since the said date.

IV.

That the court erred in holding that the bonds and coupons sought to be funded herein were sold or exchanged in good faith.

V.

That the court erred in holding that there was not a failure of consideration as to the bonds and coupons sought to be funded herein, and in not holding that the failure to build, complete and operate the Arizona Narrow Guage Railroad Company, to which company said bonds and coupons were issued, was a failure of consideration as to the bonds and coupons so issued by Pima county and sought to be funded herein.

VI.

That the court erred in not sustaining defendants' plea of
244 the statute of limitations to the coupons sought to be funded herein.

VII.

That the court erred in allowing interest on the coupons funded herein.

VIII.

That the court erred in rendering judgment for plaintiffs herein, for the reason that it appears by the evidence herein that plaintiffs have no right to sue herein, except for the bonds and coupons owned by them personally, and because it further appears herein that no authority was given by the owners of the bonds, which were not owned by plaintiffs, under which plaintiffs were authorized to bring suit on any bonds not owned by them, and because the agreement by which the firm of Coler & Co. and plaintiffs undertake to carry on this litigation, and advance all costs and expenses and to save the owners of the various bonds harmless from any such costs and expenses in case of a failure to secure a settlement or enforcement of the alleged indebtedness represented by said bonds, is illegal and void and contrary to public policy and not enforce-able in the courts.

Wherefore, appellants pray that this cause be reversed and that the petition for a mandamus herein be dismissed and the petitioners take nothing by their action, and the defendants recover their costs herein, and for all proper orders in the premises.

C. F. AINSWORTH,
By ROCHESTER FORD,
Attorney General of Arizona, for Appellants.
ROCHESTER FORD,
Of Counsel.

245 (Endorsed:) No. 546. In the supreme court, Territory of Arizona. James L. Utter *et al.* Assignment of errors. Filed June 1, 1901. Thomas Grindell, clerk.

246 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
BENJAMIN J. FRANKLIN ET AL., Respondents. } Bill of Exceptions.

Be it remembered, that on June 1, 1901, the respondents in the above-entitled cause filed their motion to reform the judgment herein, which said motion was in words and figures as follows, to wit:

In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
BENJAMIN J. FRANKLIN ET AL., Respondents. } Motion to Reform Judgment.

Come now respondents herein, by their counsel, and move the court to reform and modify its judgment herein so that there shall be funded only the bonds proved to be owned by the plaintiffs herein, to wit: eleven bonds owned by J. L. Utter and thirty bonds owned by Elizabeth B. Voorhies, and in support of this motion re-

spondents show to the court that all the bonds herein sought to be funded were at the solicitation of the firm of Coler & Co.
247 placed in the hands of said firm under letters of authority as follows; as shown by the testimony herein:

Messrs. W. N. Coler & Co., New York city.

GENTLEMEN: We herewith enclose you bonds No. — amounting to $— with full authority to deal with them in the same manner as all other bonds of said issue, placed in your hands and with authority to change the form of said indebtedness in such manner as you deem to the best interest of all the bondholders, and accept in lieu thereof such new securities as in your judgment may be best, and we also agree to pay our proportionate share of any and all expenses incurred by you in connection with this matter, it being understood however that nothing in this shall be construed as an obligation upon our part to assume any expense whatever in the event of your failure to secure a settlement or enforcement of this indebtedness.

Yours truly,

And respondents further represent in support of this motion that all of the one hundred and fifty bonds and coupons were accordingly placed in the hands of Coler & Co. under this authority.

And respondents further submit in support of this motion that the said agreement between the bondholders and Coler & Co. was one whereby said Coler & Co. agreed to defray all the expenses connected with said bonds and the holders of said bonds were
248 not to defray any of said expenses in the event of a failure to secure a settlement of such indebtedness, and that such agreement upon the part of Coler & Co. was illegal and void, and that neither Coler & Co. or James L. Utter or Elizabeth B. Voorhies acquired by virtue of said agreement or otherwise any title to any of said bonds not individually owned by them on which they could bring this action.

Wherefore, respondents move.

ROCHESTER FORD,
Of Counsel for Respondents.

And thereafter, to wit: on the said first day of June, 1901, said motion came on for hearing and was submitted by counsel for the respective parties, and thereupon taken under advisement by the court, and thereafter, to wit: on said June 1, 1901, the court being fully advised in the premises did deny and overrule said motion, to which action of the court in denying and overruling said motion respondents, by their counsel, then and there instantly excepted.

And in order that the said motion and the ruling of the court thereon may be made part of the record, respondents on this the said first day of June, 1901, tender this their bill of exceptions and pray that the same may be signed, sealed and made part of the record, and the said bill of exceptions being exhibited to the counsel

for petitioners herein, and found to be correct is so signed,
249 sealed and made part of the record herein, this June 1, 1901.

WEBSTER STREET, [SEAL.]
Chief Justice of the Supreme Court
of the Territory of Arizona.

The foregoing bill of exceptions is correct.

BARNES,
Attorney for Petitioners.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al.* petitioners, *vs.* B. J. Franklin, *et al.*, respondents. Bill of exceptions. Filed June 1st, 1901. Thomas Grindell, clerk.

250 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright, and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs, *vs.* BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. Bruce, Loan Commissioners of the Territory of Arizona, Defendants.	Motion for Allowance of Appeal.

Now come N. O. Murphy, C. H. Akers and J. W. Vickers, by their attorney, Hon. C. F. Ainsworth, attorney general of Arizona, and also N. O. Murphy, governor, C. H. Akers, secretary and J. W. Vickers auditor of the Territory of Arizona, and personally and also officially, as constituting the loan commissioners of the Territory of Arizona (if said board of commissioners is in existence), as such board of commissioners and as such loan commissioners, appealing as and for such board of commissioners, give notice of appeal in this cause and ask that said notice be entered upon the minutes of this court.

Said appellants personally and officially, as such board of commissioners, pray that this court grant an appeal from its judgment rendered this 22nd day of March, 1901, to the Supreme Court of the United States, upon their giving, executing and filing with the clerk of this court a bond, to be approved according to law, in the
251 penal sum of one thousand dollars.

C. F. AINSWORTH,
Attorney General of the Territory of Arizona,
for all said Appellants.
ROCHESTER FORD,
Of Counsel for said Appellants.

(Endorsed:) No. 546. In supreme court, Territory of Arizona. James L. Utter, *et al.*, plaintiffs, *vs.* Benjamin J. Franklin, *et al.*, defendants. Motion for allowance of appeal. Filed June 1st, 1901. Thomas Grindell, clerk.

252 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright, and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs, vs. BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. Bruce, Loan Commissioners of the Territory of Arizona, Defendants.	Application for and Allowance of Appeal.

Whereas, in the above-entitled cause the supreme court of the Territory of Arizona did on the 22nd day of March, 1901, render judgment that N. O. Murphy, C. H. Akers and J. W. Vickers, then and there respectively the governor, secretary and auditor of the Territory of Arizona, are the loan commissioners of the Territory of Arizona, and did further order, adjudge and decree that they as such loan commissioner should fund the bonds and coupons set out in the petition in this cause, and the said N. O. Murphy, C. H. Akers and J. W. Vickers, conceiving themselves aggrieved by such final judgment, holding that they are loan commissioners, and said N. O. Murphy, governor, C. H. Akers, secretary, and J. W. Vickers, auditor of the Territory of Arizona, constituting said loan commissioners (if said board of commissioners is in existence) conceiving themselves as such board of commissioners and as such loan commissioners aggrieved by such final judgment, do for themselves and also
253 officially, as such board of commissioners, and as such loan commissioners, as and for such board of loan commissioners, appeal from said order and judgment to the Supreme Court of the United States, and pray that this their appeal from said order and judgment may be allowed, and that a transcript of the record upon which said order and judgment were made duly authenticated, may be sent to the Supreme Court of the United States.

C. F. AINSWORTH,
Attorney General of the Territory of Arizona, for all said Appellants.
ROCHESTER FORD,
Of Counsel for said Appellants.

And now, to wit: on the 1st day of June, 1901, it is ordered that the appeal be allowed as prayed for above upon appellants executing and filing with the clerk of this court within thirty days from the date hereof a bond in the penal sum of one thousand ($1,000.00) dollars to be approved according to law.

WEBSTER STREET,
Chief Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 546. In supreme court, Territory of Arizona James L. Utter, *et al. v.* Benjamin J. Franklin, *et al.* Application — and allowance of appeal. Filed June 1st, 1901. Thomas Grindell, clerk.

254 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright, and William H. McGinnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. Bruce, Loan Commissioners of the Territory of Arizona, Defendants.
} Assignment of Errors.

Come now the appellants herein, by their counsel, and allege that in the record and proceedings in the above-entitled cause there is manifest error in this to wit:

The findings of fact as found by the court herein are insufficient to support the judgment, and the judgment and decision are contrary to law for the reason that it fully appears from said findings of fact that the bonds and coupons sought to be funded herein were not sold or exchanged in good faith in accordance with the act of the legislature of Arizona, approved February 21, 1883, under which act said bonds and coupons were issued.

Appellants therefore pray that this cause be reversed and that the petition herein be dismissed and that such judgment be rendered as justice requires.

255 C. F. AINSWORTH,
By ROCHESTER FORD,
Attorney General of Arizona, for Appellants.
ROCHESTER FORD,
Of Counsel.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al. vs.* B. J. Franklin, *et al.* loan commissioners. Assignment of errors. Filed June 24, 1901. Thos. Grindell, clerk.

256 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright, and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. Bruce, Loan Commissioners of the Territory of Arizona, Defendants.
} Bond on Appeal.

Know all men by these presents: That we, N. O. Murphy, C. H. Akers and J. W. Vickers, and N. O. Murphy, governor, C. H. Akers,

secretary, and J. W. Vickers, auditor of the Territory of Arizona, constituting the board of commissioners, styled the loan commissioners of the Territory of Arizona, as such loan commissioners, and as and for and on behalf of such board of commissioners, as principals, and Barron M. Jacobs and H. B. Tenney, as sureties, are held and firmly bound unto James L. Utter and George Albright, Wesley Albright and William H. Maginnis, as executors of the last will and testament of Elizabeth B. Voorhies, deceased, in the penal sum of one thousand ($1,000.00) dollars, lawful money of the United States of America, to be paid to the said appellees, for the payment of which, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators, firmly by
257 these presents.

Signed and sealed this 6th day of June, 1901.

The condition of the foregoing bond is such that, whereas, said N. O. Murphy, C. H. Akers and J. W. Vickers, and said N. O. Murphy, governor, C. H. Akers, secretary, and J. W. Vickers auditor of the Territory of Arizona, constituting the board of commissioners, styled the loan commissioners of the Territory of Arizona, as such loan commissioners, as and for and on behalf of such board of commissioners, have taken and have been allowed an appeal to the Supreme Court of the United States from a final judgment rendered in the above-entitled cause on March 22, 1901, in favor of the appellees and plaintiffs herein.

Now if said appellants shall prosecute their appeal to effect, and if they fail to make their plea good, shall answer all costs and damages, then this obligation shall be null and void, otherwise to be and remain in full force and effect.

N. O. MURPHY,
C. H. AKERS, AND
J. W. VICKERS, [SEAL.]
By C. F. AINSWORTH,
Attorney General of Arizona, Their Attorney.

N. O. MURPHY, *Governor,*
C. H. AKERS, *Secretary, and*
J. W. VICKERS,
Auditor, of the Territory of Arizona,
Constituting the Board of Commissioners, Styled the Loan Commissioners of the Territory of Arizona, as Such Loan Commissioners, as and for and on Behalf of Such Board of Commissioners, [SEAL.]
258 By C. F. AINSWORTH,
Attorney General of Arizona, Their Attorney.

BARRON M. JACOBS. [SEAL.]
H. B. TENNEY. [SEAL.]

UNITED STATES OF AMERICA, }
Territory of Arizona, County of Pima, } ss:

Barron M. Jacobs and H. B. Tenney, being severally duly sworn, depose and say, each for himself and not one for the other, that he

is a resident and freeholder within the Territory of Arizona, and that he is worth at least the sum of one thousand dollars, for which he has become surety upon the above-entitled bond, over and above his just debts and liabilities, and exclusive of property exempt from execution.

BARRON M. JACOBS.
H. B. TENNEY.

Subscribed and sworn to before me this 6th day of June, 1901.
[SEAL.] WILEY E. TUSSING,
Notary Public, Pima County, Arizona.

My commission expires April 18, 1905.

259 The foregoing bond is satisfactory to me.
W. H. BARNES,
Attorney for Plaintiffs and Appellees.

The foregoing bond is hereby approved this 24th day of June, 1901.
[COURT SEAL.] WEBSTER STREET,
Chief Justice of the Supreme Court of Arizona.

(Endorsed:) No. 546. In the supreme court, Territory of Arizona. James L. Utter, *et al.*, *v.* Benjamin J. Franklin *et al.* Bond on appeal. Filed June 24, 1901. Thos. Grindell, clerk.

260 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright, and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. Bruce, Loan Commissioners of Arizona, Defendants.
} Affidavit of Value.

TERRITORY OF ARIZONA, *County of Pima*, } *ss:*

Rochester Ford, of lawful age, being duly sworn according to law, makes oath and says: That he is one of the attorneys for the defendants in the above-entitled cause, and that he is cognizant of the amount involved therein, and that the matter in dispute, exclusive of costs, exceeds the sum of five thousand ($5,000.00) dollars, and also exceed- the sum of one hundred and eighty thousand ($180,000.00) dollars.

ROCHESTER FORD.

Subscribed and sworn to before me this 11th day of June, 1901.
[SEAL.] WILEY E. TUSSING,
Notary Public in and for said County and Territory.

My commission expires April 18, 1905.

(Endorsed:) No. 546. In supreme court, Territory of Arizona. James L. Utter, *et al.* v. Banjamin J. Franklin, *et al.* Affidavit of value. Filed June 24, 1901, Thomas Grindell, clerk.

261 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and ELIZABETH B. VOORHIES, Petitioners,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. BRUCE, Loan Commissioners of the Territory of Arizona, Defendants. } No. 546.

Be it remembered that on Thursday, June 1st, 1899, that being a regular judicial day of the January term, 1899, of said court, the following record of this case for this day was made, to wit:

Title of Cause.

In this cause it appearing that a mandate of the Supreme Court of the United States, reversing the judgment of this court in this cause and appealed from, has been filed in the office of the clerk of this court. And the motion of Wm. H. Barnes, attorney for the petitioners in above case, filed herein, in accordance with, and pursuant to, the proceedings of the Supreme Court of the United States as appears in the mandate, suggested the death of Elizabeth B. Voorhies, and moved that George Albright, Wesley Albright
262 and William Maginnis, as executors of the last will and testament of said deceased, be substituted for that of deceased, and he also moved for a writ of mandamus as prayed for in the petition directed to the loan commissioners of Arizona, the court ordered said motion submitted and further ordered that the hearing of said motion be set for June 2nd, at 10 o'clock a. m., on oral argument.

On Friday, June 2nd, 1899, that being a regular judicial day of the January term, 1899, of said court, the following record in this case was made this day, to wit:

Title of Cause.

On motion of Mr. C. W. Wright, it was ordered that Mr. Rochester Ford's name be entered as one of counsel for respondents in this cause.

(A recess was then taken by the court until 2 o'clock p. m.)

Two o'clock court reconvened, and the following orders were made, to wit:

Title of Cause.

In this cause, the motion for mandate to be issued to lower court, came on to be heard and was argued by Mr. W. H. Barnes for petitioners and Mr. C. W. Wright and Rochester Ford for respondents, and cause ordered submitted.

It is further ordered by the court that the respondents have
263 10 days to file briefs on said motion, and the petitioners have the required time thereafter to file their reply.

On Wednesday, November 1st, 1899, that being a regular judicial day of the October term, 1899, of said court, the following record was made in this case for this day, to wit:

Title of Cause.

In this cause it is ordered that the motion to substitute the executors of the last will and testament of Elizabeth B. Voorhies, one of the plaintiffs in the case, in accordance with the order of the Supreme Court of the United States, be and the same is hereby granted.

It is further ordered that respondents be granted permission to file an amended return and answer.

It is further ordered that petitioners be granted leave to file reply to the answer of respondents.

The following record was also made on Wednesday, November 1st, 1899, to wit:

Title of Cause.

Upon motion of W. H. Barnes, Esq., Mr. C. W. Wright stated he appeared as attorney for the respondents in this case.

Mr. Wright asked that this case be referred to some court to take the testimony and determine the questions of fact involved, and report same to this court. The court suggested that an application
264 be formally filed for some proceedings to be taken to try the issues of fact in the case. Counsel stated the issues were not fully made up yet, and the court stated that until the issues are finally made up the court cannot act.

On Tuesday, January 9th, 1900, that being a regular judicial day of the January term, 1900 of said court, the following record in this case was made for this day, to wit:

Title of Cause.

On motion of Mr. W. H. Barnes, attorney for petitioners, it is ordered that this cause be passed until tomorrow morning, Jan. 10th, 1900.

On Friday, January 12th, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record was this day made in this case, to wit:

Title of Cause.

Mr. W. H. Barnes, attorney for petitioners, moves the court to set cause for trial. Mr. Rochester Ford moves that this cause be referred to the district court of the first judicial district, in and for Pima county, and tried before a jury. Whereupon the court ordered the respective motions to be submitted for consideration.

264½ On Tuesday, January 16th, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record in this case was made this day, to wit:

Title of Cause.

In this cause, it is ordered that the motion of respondents, for cause to be referred to the district court of Pima county for jury trial, be and the same is hereby denied.

It is further ordered that Mr. Clinton D. Hoover be appointed referee to take evidence in the Territory, and that he have until Monday, March 26th to take said evidence, and cause ordered set for hearing March 26th, in this court.

On Monday, March 26th, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record in this case was this day made, to wit:

Title of Cause.

On motion of Attorney General Ainsworth, it is ordered that he have permission to file motion to dismiss.

The following record in this case was also made on Monday, March 26th, 1900, to wit:

Title of Cause

The motion of respondents for continuance, filed herein, was ordered submitted.

265 On Tuesday, March 27th, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record in this case was made for this day, to wit:

Title of Cause.

It is ordered that the motion for continuance, filed herein by respondents, and heretofore submitted, be granted, and the cause continued until June first.

It is further ordered that the motion to dismiss, filed herein by respondents be held in abeyance until cause comes on regularly for hearing.

On Friday, June 1st, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record in this case was made this day, to wit:

Title of Cause.

It is ordered that W. H. Barnes, Esq., have until 2 o'clock this afternoon to read affidavits of C. W. Wright and Rochester Ford, filed herein.

(A recess was then taken by the court until two o'clock p. m.)

Two o'clock p. m. court reconvened, and the following record in this case was made, to wit:

Title of Cause.

It is ordered that this cause be submitted on briefs, allowing petitioners 30 days in which to complete evidence, and respondents 60 days thereafter.

266 On motion of W. H. Barnes Esq., attorney for petitioners herein; it is ordered that he be allowed to take to Tucson report of referee C. D. Hoover.

On Saturday June 2nd, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record in this case was made this day, to wit:

Title of Cause.

It is ordered that the motion for security for costs, filed herein by respondents, be and the same is hereby denied.

On Friday March 22nd, 1901, that being a regular judicial day of the January term, 1901 of said court, the following record was made in this case this day, to wit:

Title of Cause.

This cause having been heretofore submitted, and by the court taken under consideration and the court having considered the same and being fully advised in the premises: It is ordered that the writ of mandate prayed for, requiring the loan commissioners to fund the bonds in question, together with the interest due thereon under the provisions of the act of June 25, 1890, issue.

267 It is further ordered, adjudged and decreed that the plaintiffs herein, James L. Utter and George Albright, Wesley Albright and William H. Maginnis, as executors of the last will and testament of Elizabeth B. Voorhies, deceased, do have and recover of and from the defendants herein their costs in this court taxed at — dollars.

On Saturday March 23rd, 1901, that being a regular judicial day of the January term, 1901 of said court, the following record in this case was made this day, to wit:

Title of Cause.

On motion of Attorney General Ainsworth, it is ordered that attorney for respondents have 10 days in which to file counter-statement.

On Saturday June 1st, 1901, that being a regular judicial day of the January term, 1901 of said court, the following record in this case was this day made, to wit:

Title of Cause.

It is ordered that the motion for rehearing filed herein by respondents, also motion to reform and modify judgment, be submitted.

The following record in this case was also made on Saturday, June 1st, 1901, to wit:

Title of Cause.

268 The motion for rehearing filed herein by respondents having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that said motion be and the same is hereby denied.

It is further ordered that the motion to reform and modify judgment be denied.

And also the following record was made in this case on Saturday, June 1st, 1901, to wit:

Title of Cause.

Hon. C. F. Ainsworth, attorney general of the Territory of Arizona, as attorney for N. O. Murphy, C. H. Akers and G. W. Vickers, and also, as attorney for said N. O. Murphy, governor, C. H. Akers, secretary, and G. W. Vickers, auditor of the Territory of Arizona, constituting the loan commissioners of the Territory of Arizona (if such loan commissioners are in existance) herein, in open court, on this first day of June, 1901, being one of the regular judicial days of the January term, 1901, of the supreme court of Arizona, gave notice of appeal for said N. O. Murphy, C. H. Akers and G. W. Vickers, and for said loan commissioners, acting officially, as and for the board of commissioners, styled the loan commissioners of the Territory of Arizona, to the Supreme Court of the United States, and prayed for an allowance of such appeal, whereupon it was ordered by the court that an appeal be granted as prayed for to the Supreme
269 Court of the United States from the order and judgment of this court upon said appellants filing with the clerk of this court a bond in the sum of one thousand dollars, approved according to law.

And also the following record was made in this case on Saturday, June 1st, 1901, to wit:

Title of Cause.

An appeal having been prayed for and allowed herein from the order and judgment of this court in the above-entitled cause to the Supreme Court of the United States, the court doth now, under the provisions of section 1868, of the Revised Statutes of the United States, make and certify, on such appeal, a statement of the facts of the case, in the nature of a special verdict, and doth cause the same to be filed herein this day.

270 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Territory of Arizona,* } ss:

I, Thomas Grindell, clerk of the supreme court of the Territory of Arizona, by virtue of the foregoing appeal, and in obedience thereto, do hereby certify that the foregoing pages, numbered from 1 to 269, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of James L. Utter and George Albright, Wesley Albright and William H. Maginnis, as executors of the last will and testament of Elizabeth B. Voorhies, deceased, plaintiffs, against Benjamin J. Franklin, C. P. Leitch and C. M. Bruce, loan commissioners of the Territory of Arizona, defendants, with the exception of the depositions, and testimony taken by the commissioner, as the same remain of record and on file in said office.

Also that the citation attached hereunto, is the original citation issued by said supreme court of the Territory of Arizona.

Seal Supreme Court of Arizona.

In testimony whereof, I have caused the seal of the said supreme court of the Territory of Arizona to be hereunto affixed at the city of Phœnix, in the Territory of Arizona, this 19th day of July, 1901.

THOMAS GRINDELL,
Clerk of the Supreme Court of the Territory of Arizona.

271 In the Supreme Court of the United States.

JAMES L. UTTER and GEORGE ALBRIGHT, WESLEY ALBRIGHT, and William H. McGinnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs,

vs.

BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. BRUCE, Loan Commissioners of the Territory of Arizona, Defendants.

UNITED STATES OF AMERICA, *ss:*

To James L. Utter and George Albright, Wesley Albright, and William H. McGinnis, as executors of the last will and testament of Elizabeth B. Voorhies, deceased:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within sixty days from the date hereof pursuant to an appeal allowed by the honorable chief justice of the supreme court of Arizona, on the first day of June, 1901, from a judgment rendered in the supreme court of the Territory of Arizona on the 22d day of March, 1901, in favor of the plaintiffs in the above-entitled action, in which appeal the above-named plaintiffs are appellees and N. O. Murphy, C. H. Akers and J. W. Vickers, and N. O. Murphy governor, C. H. Akers, secretary

and J. W. Vickers, auditor of the Territory of Arizona, constituting the board of commissioners, styled the loan commissioners of the Territory of Arizona, as such loan commissioners and as and for and on behalf of such board of commissioners, are appellants, to show cause, if any there be, why the said judgment in your favor should not be corrected and reversed and speedy justice should not be done to the parties in whose behalf said appeal is allowed.

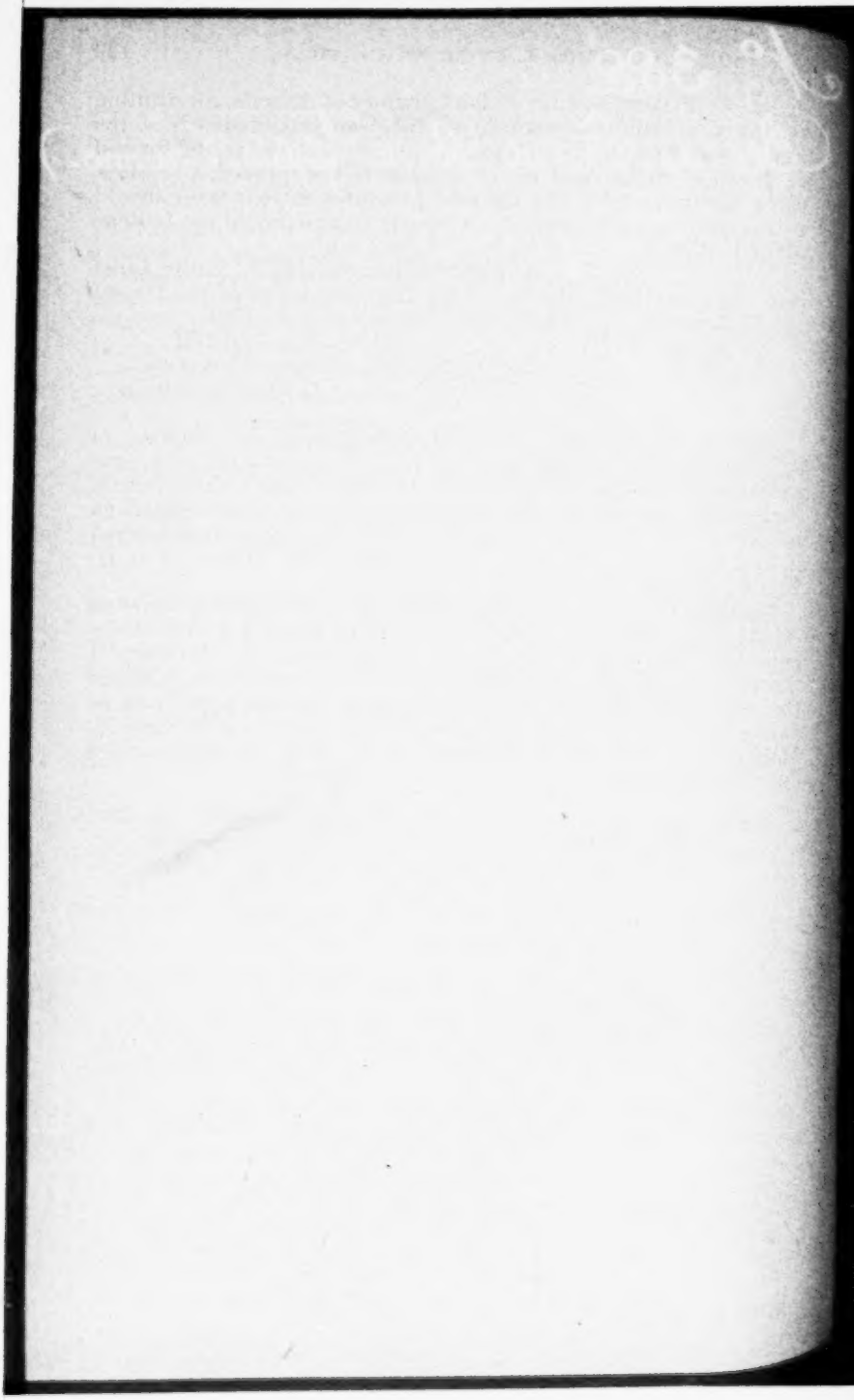
Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of June, 1901.

Seal Supreme Court of Arizona.

WEBSTER STREET,
Chief Justice of the Supreme Court of the Territory of Arizona.

[Endorsed:] No. 546. In the supreme court of the Territory of Arizona. James L. Utter *et al.*, *vs.* B. J. Franklin *et al.*, loan commissioners. Citation. Filed June 24, 1901 Thos. Grindell clerk. Service of a copy of the within citation is hereby acknowledged on behalf of each plaintiff and appellee and their appearance entered in said cause in the Supreme Court of the United States. Wm. H. Barnes, attorney for plaintiffs.

Endorsed on cover: File No. 18,241. Arizona Territory supreme court. Term No. 388. N. O. Murphy, C. H. Akers & J. W. Vickers personally and as governor, secretary & auditor of the Territory of Arizona, respectively constituting the board of commissioners, styled the loan commissioners of the Territory of Arizona, appellants, *vs.* James L. Utter, & George Albright, Wesley Albright & William H. Maginnis as executors of Elizabeth B. Voorhies, deceased. Filed July 29, 1901.



Supreme Court of the United States

OCTOBER TERM, 1901.

No. 388.

N. O. MURPHY ET AL., LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA,

vs.

JAMES L. UTTER ET AL.

REPLY OF APPELLANTS TO MOTION TO ADVANCE.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Come now appellants by their counsel, and in reply to the motion of appellees to advance this cause, respectfully submit that said motion should not be granted because:

First. This case has never been adjudicated by this court upon the merits, and therefore does not come within the provisions of paragraph 4 of rule 26.

In the case of Utter *vs.* Franklin, 172 U. S., 416, in giving the statement of the case this court said:

"Defendants demurred to the petition, and for answer thereto averred that the bonds now held by the plaintiffs

had been declared both by the supreme court of the Territory and this court to be void, and therefore the petition of the relators should be dismissed."

The judgment of the lower court which was appealed from in Utter *vs.* Franklin appears on page 10 of the record in that case, and referring to it we see that it is as follows:

"And the court being fully advised in the premises, it is ordered that the petition for the writ of mandamus herein be, and the same is hereby, denied."

This is manifestly a judgment sustaining the demurrer to the petition and nothing more. That ruling was reversed by this court, and the effect of the decision of this court and the remanding of the case "for further proceedings not inconsistent with the opinion" is nothing more than a direction to the lower court to overrule instead of sustaining defendants' demurrer to the petition.

The assignment of errors prepared by "W. H. Barnes, attorney for petitioners," in Utter *vs.* Franklin, appears on page 11 of the record therein. It was alleged as error—

"First. That the court erred in holding that the petition did not state facts sufficient to sustain the remedy asked for.

"Third. That the court erred in sustaining the demurrer to the petition in said cause."

There is a further assignment that "the court erred in refusing to sustain the demurrer to the special defense set up in bar in the answer of the respondents." If, however, the first and third assignments are valid, the decision was on the demurrer to the petition, and the court did not get beyond this point. If the court held that "the petition did not state facts sufficient to sustain the remedy asked for," it was not necessary, or even possible, to consider the sufficiency of the answer.

The opinion of this court construed the various acts of the legislature and of Congress and held that the demurrer to

the petition should be overruled, and that the supreme court of Arizona should take further proceedings not inconsistent with the opinion of this court.

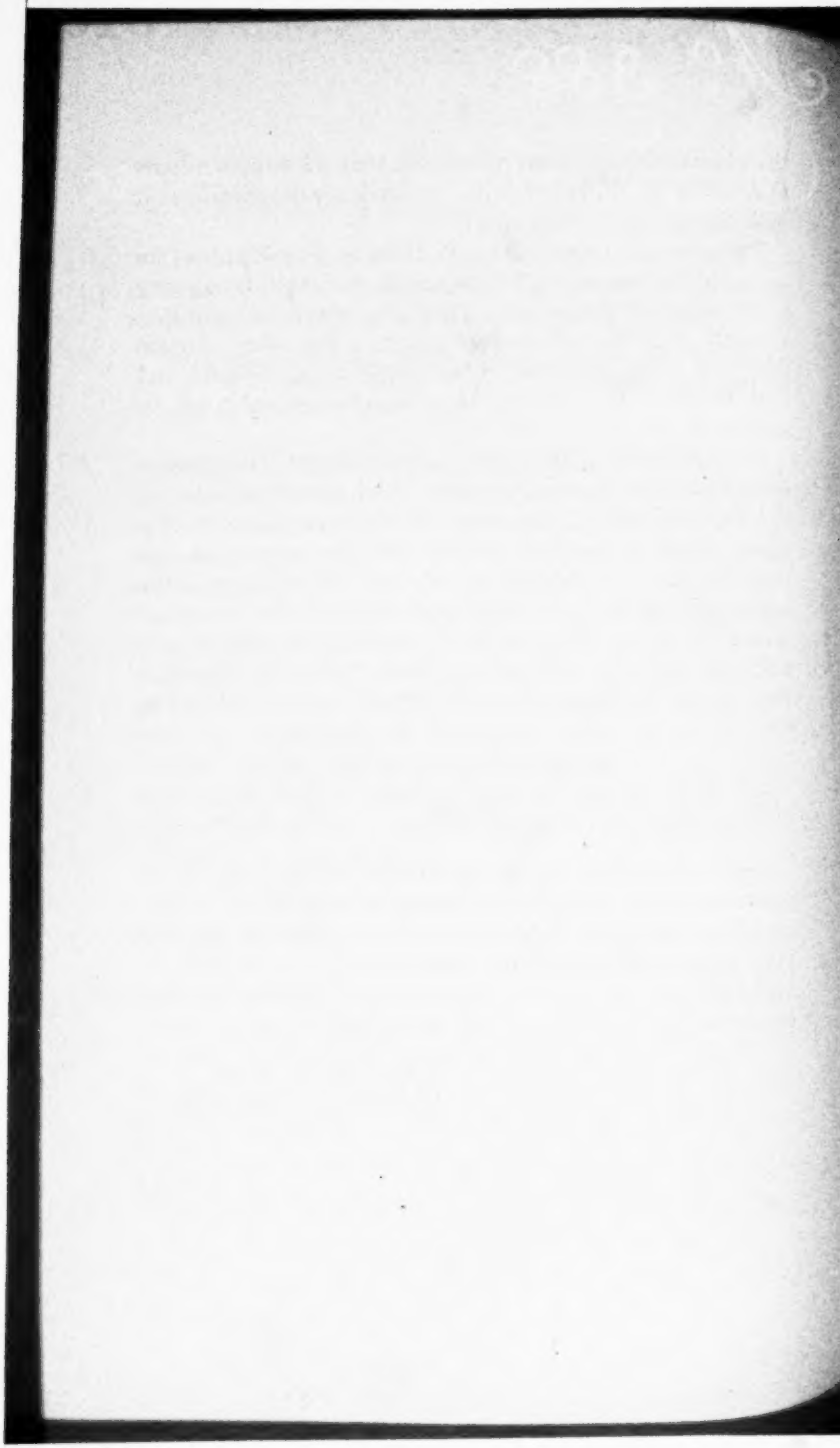
Thereupon the respondents in Utter *vs.* Franklin filed an amended answer, which for the first time alleged facts going to the merits of the action. They also raised the point that since the decision in Utter *vs.* Franklin the loan commission had been abolished by the legislature of Arizona, and that therefore the petition for a mandamus could not be sustained.

The motion to advance this case states that "the present record presents the same question which was adjudicated by this court on the said former appeal;" but as opposed to this statement we respectfully submit that the present case involves other and different questions. The opinion of the lower court shows that the question whether the loan commission is still in existence was presented and argued, as it will be before this court, and also that there was presented and argued the question whether the bonds sought to be funded "were sold or exchanged in good faith." On this point extended testimony was taken and findings of fact made, which, as appellants have alleged in their assignment of errors, do not support the judgment of the lower court.

Second. There is no other reason why this case should be advanced. The loan commission, if in existence at all, is a continuing body and appellees cannot be injured if this case takes its regular course on the docket.

For the foregoing reasons appellants submit that the motion to advance this case should be denied.

ROCHESTER FORD,
Of Counsel for Appellants.



No. 388.

FEB 6 1902
JAMES H. McKENNEY,
Clerk.

Brief of Ford for Appts.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Feb. 6, 1902.

N. O. MURPHY, C. H. AKERS AND J. W. VICKERS, AND N. O. MURPHY, GOVERNOR; C. H. AKERS, SECRETARY, AND J. W. VICKERS, AUDITOR OF THE TERRITORY OF ARIZONA, CONSTITUTING THE BOARD OF COMMISSIONERS STYLED THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, APPELLANTS,

v.

JAMES L. UTTER AND GEORGE ALBRIGHT, WESLEY ALBRIGHT, AND WILLIAM H. McGINNIS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ELIZABETH B. VOORHIES, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

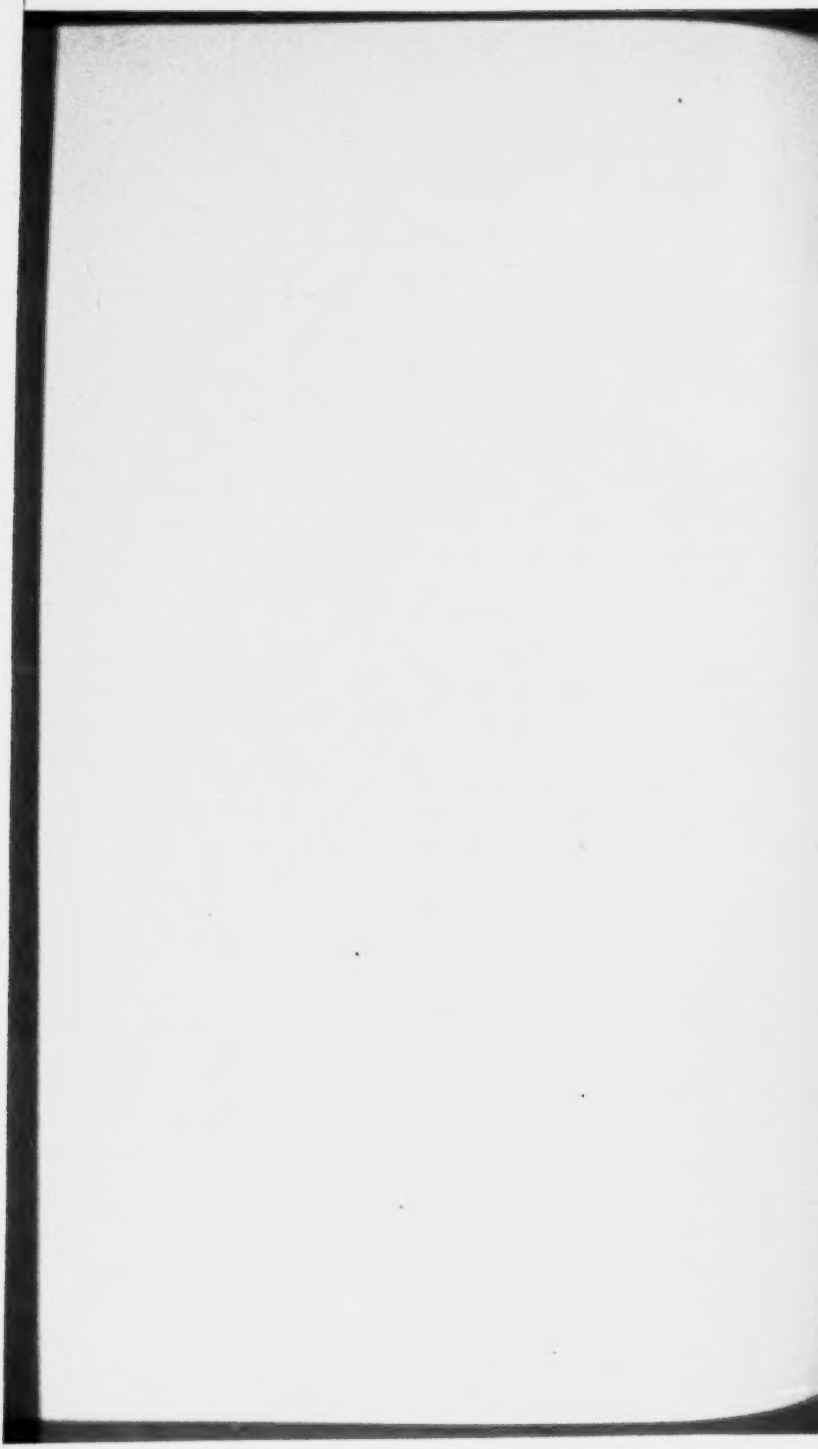
STATEMENT OF THE CASE, POINTS AND AUTHORITIES, BRIEF AND ARGUMENT FOR APPELLANTS.

ROCHESTER FORD,
Of Counsel for Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D C. 1974

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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 388.

N. O. MURPHY, C. H. AKERS AND J. W. VICKERS AND N. O. MURPHY, GOVERNOR; C. H. AKERS, SECRETARY, AND J. W. VICKERS, AUDITOR OF THE TERRITORY OF ARIZONA, CONSTITUTING THE BOARD OF COMMISSIONERS STYLED THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, APPELLANTS,

v.

JAMES L. UTTER AND GEORGE ALBRIGHT, WESLEY ALBRIGHT, AND WILLIAM H. McGINNIS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ELIZABETH B. VOORHIES, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Statement of the Case, Points and Authorities, Brief and Argument for Appellants.

STATEMENT OF THE CASE.

This case was before this court under the style of Utter *et al.*, appellants, *v.* Franklin *et al.*, as reported in 172 U. S.

416. The statement of the case as therein given by Mr. Justice Brown is as follows:

"This was a petition for a writ of mandamus to compel the defendants, who were respectively governor, auditor, and secretary of the Territory, acting as loan commissioners, to issue certain bonds in exchange for bonds issued by the county of Pima in aid of the Arizona Narrow Gauge Railroad Company.

"The petition set forth that plaintiffs were the *bona fide* holders for value of certain seven per cent. bonds and coupons issued in July, 1883, in compliance with an act of the Territory 'to promote the construction of a railroad,' approved February 21, 1883, aggregating, including principal and interest thereon, the sum of $289,964.50. There was a further allegation in the petition that it was the duty of the defendants to provide for the redeeming of such indebtedness and to issue refunding bonds therefor; that plaintiffs had made demands for the same, which defendants had refused.

"Defendants demurred to the petition, and for answer thereto averred that the bonds now held by the plaintiffs had been declared both by the supreme court of the Territory and by this court to be void, and therefore the petition of the relators should be dismissed.

"The petition being denied by the supreme court of Arizona, the relators appealed to this court. No opinion was filed in the supreme court of the Territory."

After the case was remanded to the supreme court of Arizona respondents, by leave of court, filed their amended return (rec., pp. 8–21). This return alleged (p. 9) that the bonds and coupons sought to be funded herein were never delivered by any one who was authorized by Pima county to do so; that said county never acknowledged the validity of said bonds and never paid any interest thereon; that the bonds and coupons were designed and intended by the legislature of Arizona to promote the construction of a certain railroad from Tucson, Arizona, to Globe, Arizona, but that said railroad was never constructed, equipped, or operated;

that for said bonds said Pima county received no consideration whatever; that the said bonds had been declared void by the supreme court of Arizona and the Supreme Court of the United States in the case of Lewis *v.* Pima County, 155 U. S., 54; that petitioners are not innocent holders of said bonds and coupons or of any thereof; that said bonds and coupons were "not sold or exchanged in good faith and in compliance with the act of the legislature by which they were authorized;" that the said bonds and coupons were not intended to be included and were not included in the act of Congress of June 6, 1896, or any enactment or memorial of the Legislative Assembly of the Territory of Arizona.

Said return contained the further averments as follows (rec., pp. 16–20):

VI.

And respondents for a further return allege: That all of said coupons attached to said bonds that matured and became due and payable more than five years next previous to the commencement of this action are barred by the statute of limitations in such case made and provided, and as to such coupons, and each thereof, your respondents hereby plead such statute of limitations hereto and in bar thereof.

VII.

And for a further return your respondents allege: That the said defendants, nor any nor either of them do now constitute the loan commission of the Territory of Arizona; that the said B. J. Franklin has long since departed this life, that the said C. M. Bruce is now a resident of the city of San Francisco in the State of California and that the said C. P. Leitch is not now, nor has been for more than a year last past, the auditor of said Territory; that said petition for a mandate asks that said mandate shall go against said B. J. Franklin, the said C. P. Leitch and the said C. M. Bruce in their individual capacity, and as members of the loan commission of said Territory; and for the reasons aforesaid, said individuals have not now the legal authority, nor power, to obey any mandate to them issued.

VIII.

And for a further return respondents allege: That the Twentieth Legislative Assembly of the Territory of Arizona, by an enactment duly passed, did repeal the loan commission of the Territory of Arizona, and that thereafter no loan commission exists, nor does now exist, and there is now no power in the Territory of Arizona, whereby said bonds can be funded, and that by reason of the premises the said petitioners are relegated to their action at law on said bonds.

IX.

And for a further return these respondents allege: That the said Pima county does not wish to fund said bonds and coupons, nor any thereof; and for the reason that if said bonds are funded, a new contract is thereby created, wherein and whereby said alleged indebtedness will not mature for fifty years next ensuing; and that said county, while your respondents constituted the loan commission of the Territory of Arizona, did officially notify said loan commission that it would not enter into such new contract, and would not consent to the funding of the said bonds, and did instruct said loan commission not to fund said bonds, and for the reason that, in funding said bonds, a new contract would be made to which said Pima county was not a party and would not be a party.

X.

And for a further return respondents allege: That none of the bonds and coupons claimed to be owned by plaintiffs or either of them were sold or exchanged in good faith in accordance with the act of the Territory of Arizona under which they were issued, and defendants deny that plaintiffs, or either of them are holders or owners, in good faith, and for a valuable consideration before maturity and without notice of any of said bonds or coupons.

XI.

And defendants further aver that heretofore, to wit, on November 23, 1882, the Arizona Narrow Gauge Railroad

Company filed its original articles of association in the office of the secretary of the Territory of Arizona; that said articles were under the provisions of the laws of Arizona Territory, relative to the incorporation of railroad companies, and that such articles contained, among other things the following statements and recitals:

"We, the undersigned residents of the Territory of Arizona, have subscribed and do hereby subscribe the number of shares and the sums representing the value thereof placed opposite our names hereunder to the capital stock of a corporation to be formed under the provisions of the general railroad and corporation act of Arizona Territory, approved February 14th, 1879, for the purpose of constructing, owning and maintaining railroads between the termini and over the route described as follows:

"The line begins at Tucson, Pima county, Territory of Arizona; thence, by the most favorable route in a northerly direction to a pass through the Tortilita mountains; thence in a northerly direction along the San Pedro river to its mouth; thence in a northeasterly direction along the Gila River valley to San Carlos; thence in a northerly direction to the San Carlos River valley; thence in a northeasterly direction along the western slope of the White mountains to Fort Apache; thence in a northeasterly direction to the thirty-fifth parallel of north latitude; all of said line passing into and through the counties of Pima, Pinal, Graham, Gila, and Apache, of the Territory of Arizona, and the aggregate length of said railroad being about two hundred and ten miles."

That in said articles of incorporation were the subscriptions of eleven persons each in the amount of twenty thousand dollars to the capital stock of said proposed railroad, and that said articles also contain the following:

Estimate of actual cost of constructing a railroad of three-feet gauge along the line set forth in the foregoing articles of association, together with the cost of right of way, motive power, depots and stations, rolling stock, and other appurtenances and things for the completion and running of the road.

"*Estimate per Mile.*

"Right of way, station grounds and buildings	$300.00
"Motive power	250.00
"Cars of all kinds	210.00
"Rails, fastenings, and track-laying	6,300.00
"Ties, 2,640 per mile	1,300.00
"Grading and bridging	5,100.00
"Incidental and miscellaneous	400.00
"Total cost per mile	$13,860.00
"Total cost of 210 miles	$2,910,600.00

"I, John P. Culver, hereby certify that I am a civil engineer by occupation and profession; that I have had examined the line of the road hereinbefore proposed and set forth, and have estimated the actual contemplated cost of construction of said road, together with the cost of right of way, motive power, and every other appurtenance and thing for the completion and running of said road, and the actual contemplated cost, as nearly as can be estimated, is the sum of $2,910,600.

"JNO. P. CULVER."

Defendants further aver that the said Arizona Narrow Gauge Railroad Company was the same Arizona Narrow Gauge Railroad Company referred to in act No. 35 of the Twelfth Legislative Assembly of the Territory of Arizona, entitled "An act to promote the construction of a certain railroad."

XII.

Defendants further aver that before the time when any bonds of Pima county could lawfully be exchanged in good faith under the provisions of said act number 35, the bonds of Pima county being the same bonds claimed to be owned by plaintiffs herein, were by the agents of said Arizona

Narrow Gauge Railroad Company wrongfully and without the order or consent of the board of supervisors of Pima county, abstracted from the possession of the treasurer of Pima county, who was holding said bonds and all of them for safe keeping until a time when said bonds could lawfully and in good faith be delivered and exchanged, and that in lieu of said Pima county bonds one hundred and fifty bonds of the Arizona Narrow Gauge Railroad Company, each payable to Pima county or bearer, each in the sum of one thousand dollars, each dated ——, 1883, and each having interest coupons payable semi-annually attached thereto, were left in the office of said treasurer of Pima county; and defendants further aver that said bonds of said Arizona Narrow Gauge Railroad Company are identical in amount, date and time of payment of principal and coupons with the bonds of Pima county claimed to be owned by plaintiffs herein.

XIII.

Defendants further aver that said Arizona Narrow Gauge Railroad Company is, and at all the times herein mentioned, was insolvent, and that the said company never built or operated any part of the railroad proposed to be built and operated according to its said articles of incorporation, or any railroad whatever, and that immediately after coming into possession of the bonds of Pima county claimed to be owned by plaintiffs herein it ceased all operations and business and pretense of doing business, and defendants aver that the bonds and coupons and all of them of said Arizona Narrow Gauge Railroad Company are and at all times have been worthless and without any value whatever, that immediately upon being informed of the fact that the bonds of Pima county had come into the possession of the said railroad company the board of supervisors of Pima county used all the efforts within their power to recover possession of said bonds, and declined and refused to pay any interest on same and that no interest on said bonds was ever paid by said Pima county, and that said Arizona Narrow Gauge Railroad Company cannot now and never could perform its obligation to build said railroad or any part of it, and defendants aver that there is a total want of consideration for the said bonds and coupons and all of them claimed to be owned by plain-

tiffs herein, and a total failure of the consideration for said bonds and coupons and all of them.

XIV.

Defendants further aver that none of the said bonds and coupons of Pima county were negotiated or transferred by said Arizona Narrow Gauge Railroad Company till many years after the said railroad company had ceased to do any business of any sort and many years after the consideration for the bonds of said Pima county had wholly failed as aforesaid, and defendants aver that the original transferees of said bonds and coupons and all subsequent holders thereof and the plaintiffs and each of them herein had notice and knowledge prior to any transfer of said bonds and coupons of said Arizona Narrow Gauge Railroad Company of the purported consideration of said bonds and of the insolvency of said railroad company and of the fact that it had not built and could not build the said railroad or any part thereof proposed by it to be built, and of the fact that the purpose of building said railroad had long prior thereto been abandoned and that all said transferees and holders of said bonds and coupons of said Pima county had notice and knowledge prior to any such transfer of same of the want of consideration and total failure of consideration of all of said bonds and coupons and knowledge and notice prior to any transfer of said bonds and coupons of all the facts herein set out and alleged.

XVI.

Defendants further aver that the cause of action on the coupons claimed to be owned by plaintiffs herein was not commenced and prosecuted within five years after the cause of action accrued, and defendants plead the statute of limitations of the Territory of Arizona, to wit, paragraph 2314, and the amendments thereto of the Revised Statutes of the Territory of Arizona, 1887.

XVII.

And for a further defense thereto defendants plead as a counter-claim or set-off the said bonds and coupons of the said Arizona Narrow Gauge Railroad Company hereinbefore

set out and described, and defendants aver that none of the said bonds or coupons have been paid, but that the same and all thereof are now due the said Pima county, so far as the same have matured and are unpaid.

Petitioners filed an amended reply (rec., pp. 50–64) denying the allegations of the amended return and averring that the facts set up therein constitute no defense to this case. Paragraph IX of said reply is as follows:

"IX

"As to subdivision VIII of said answer the petitioners deny the allegations of said answer that the said legislature of the Territory of Arizona repealed the loan commission of Arizona and that the loan commission no longer exists; and petitioners allege that the legislature of the Territory of Arizona had no power to repeal the same, and that any attempt to do so is void and of no force and effect."

The findings of fact in the nature of a special verdict (rec., pp. 91–109) show that:

I.

That the Arizona Narrow Gauge Railroad Company, mentioned in the act of the legislature of the Territory of Arizona approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," filed its articles of association with the secretary of the said Territory on the 23d day of November, 1882, which articles specified that the undersigned subscribed to the shares opposite their names to the capital stock of the corporation, under the general railroad act of the Territory of February 14, 1879, for the purpose of constructing, owning, and maintaining railroads, the line to begin at Tucson, Arizona, thence by the most favorable route in a northerly direction along the San Pedro river to its mouth; thence in a northeasterly direction along the Gila river to San Carlos; thence

in a northerly direction to the San Carlos river; thence northeasterly to Fort Apache; thence northeasterly to the thirty-fifth parallel, passing into and through the counties of Pima, Pinal, Graham, Gila, and Apache; signed by eleven persons, each subscribing two hundred shares, of the value of $2,000; which articles are in words and figures as follows, to wit:

"We, the undersigned, residents of the Territory of Arizona, have subscribed and do hereby subscribe the number of shares and the sums representing the value thereof placed opposite our names hereunder to the capital stock of a corporation to be formed under the provisions of the general railroad incorporation act of Arizona Territory, approved February fourteenth, 1879, for the purpose of constructing, owning and maintaining railroads, between the termini and over the route described as follows:

"1. The line begins at Tucson, Pima county, Territory of Arizona, thence by the most favorable route in a northerly direction to a pass through the Tortilita mountains, thence in a northerly direction along the San Pedro river to its mouth; thence in a northeasterly direction along the Gila River valley to San Carlos; thence in a northerly direction to the San Carlos River valley; thence in a northeasterly direction along the western slope of the White mountains to Fort Apache; thence in a northeasterly direction to the thirty-fifth (35th) parallel of north latitude, all of said line passing into and through the counties of Pima, Pinal, Graham, Gila and Apache of the Territory of Arizona, and the aggregate length of said road being about two hundred and ten miles."

Article III of the articles of incorporation of the railroad company is as follows:

"The amount of the capital stock of this corporation shall be three million dollars, which shall be divided into thirty thousand shares of one hundred dollars each, which sum is the actual contemplated cost of constructing the road herein proposed to be constructed, together with the cost of the right of way, motive power and every other appurtenance and thing for the completion and running of said road as

nearly as can be estimated by John P. Culver of Tucson, Arizona Territory, a competent engineer, whose estimate and report is annexed hereto and made a part hereof."

The act of the Territory approved February 21, 1883, and an act supplemental thereto approved March 6, 1883, are set out in full in the appendix to this brief.

It appears from the fourth finding of fact (rec., p. 95) that when application was made by the Arizona Narrow Gauge Railroad Company to the board of supervisors of Pima county for the first $50,000 of bonds, the following resolution was offered by one of the supervisors:

"Ordered, that the board, having duly considered the application of the Narrow Gauge Railroad Company for an exchange of $200,000 of bonds, and being of the opinion that the said railroad company is not in position to give any guarantee that they intend in good faith to build said road; it is ordered that until said company do some act in accordance with the provisions of the law under which they ask an exchange of bonds, their application be refused and denied."

This motion was not carried, and the following resolution was passed:

"Ordered, $200,000 of the bonds of the county of Pima drawn in accordance with an act of the Legislative Assembly of the Territory of Arizona, entitled 'An act to promote the construction of a certain railroad,' approved the 21st day of February, A. D. 1883, be issued, and that the same be placed in the hands of the county treasurer upon the Narrow Gauge Railroad Company giving bonds to the county of Pima in the sum of five hundred dollars, conditioned that if the above bonds are not exchanged in accordance with the provisions of said act for the bonds of the above-named railroad, that said company will repay the said county of Pima all expenses incurred in the issuance of said bonds; the bond to be approved by the board after submission to the district attorney as to form."

It further appears from the said findings that other proceedings were as follows:

"That on June 16, 1884, there was entered in the minutes of the said board of supervisors of Pima county, the following: Ordered that the chairman of the board be authorized when he shall deem it expedient, to institute proceedings for the recovery of the county bonds issued to the Arizona Narrow Gauge Railroad Company, and to stop the payment of the interest thereon. That on said June 16, 1884, there was filed in the office of the clerk of the board of supervisors of said Pima county, Arizona, a paper signed William C. Davis, president of the A. & G. R. R. Co., and attested C. C. Stevens, secretary, and addressed to the board of supervisors of said county as follows: 'The A. & G. R. R. Co. by its president, W. C. Davis, hereby offers for reasons that are obvious and well understood by your honorable board, to the supervisors of Pima county, $50,000 of Pima county bonds now held by said corporation and accept in full payment therefor, Pima county warrants of the face value to the amount of $22,500 and the corporation bonds heretofore exchanged for said county bonds. This sum of $22,500 is about $1,000 less than the actual *bona fide* expenses of the said corporation in the construction of the said road to date.' That there was filed on the same day with the said clerk and signed by the same man as president of the said railroad company, and addressed to the board of supervisors of Pima county, a paper to the effect that the said railroad company 'hereby offers to release the county of Pima from all obligations to said Arizona Narrow Gauge Railroad Company under an act of the legislature of Arizona, approved February 21, 1883. The said railroad company hereby offers and proposes to return to the supervisors of the said county of Pima $50,000 in bonds of said county issued to said company by said supervisors under said act, and release said county from the transfer of their bonds with said company under and by virtue of the above-mentioned act. The reasons of the proposed release of the said county are inability of the said company to dispose of said bonds in the amount of $50,000 advantageously and to the benefit of the said company, greater than the consideration hereinafter mentioned, as a consideration asked from the said county of Pima for the above-mentioned re-

lease and retransfer of the said bonds of the said county. The said company proposes and offers to release the said county as aforesaid and retransfer to the said county the $50,000 in bonds of said county upon the said board of supervisors returning to the said company the $50,000 of bonds of said company now held by the said board of supervisors, and the further consideration of the issuance to the said railroad company by the board of supervisors of warrants of the said county of Pima in the amount of $18,500.' That on November 7, 1884, the following minute entry appears in the proceedings of the said board of supervisors: 'Ordered, all members voting "aye" that the county treasurer be instructed not to pay any interest on the bonds issued by the county to the Arizona Narrow Gauge Railroad Company until he receive the further order of the board, and that the clerk transmit a copy of this order to the treasurer."

The fifth finding of fact is as follows:

V.

That there is no evidence in the records of the board of supervisors or the office of the treasurer of said Pima county how the first $50,000 of bonds came into the possession of the Arizona Narrow Gauge Railroad Company. That the incorporators of the said railroad company had no way in which they could reasonably count on having this road built that they had no funds promised or secured with which to complete the road at the time and no arrangement with any capitalists or syndicate by which the money was to be furnished to complete the road; that they did not expect to put in the money themselves and had no idea where they were to get it. That the company in 1883 had graded about five and a half or six miles and had purchased ties and timber for bridges, but had no rails on the part graded. That the company suspended work in 1883 and that work was not resumed till about August 1886. That the company had made an offer to sell the first $50,000 of bonds of Pima county, and almost everybody in the company tried to sell them. That the treasurer of the company was one B. M. Jacobs, a banker in the city of Tucson, Arizona, and that he had tried through the usual channels to place the

bonds in New York, San Francisco and other places, and could not find any purchasers. That the company sent an attorney East to negotiate the bonds, but he was not able to do so; that the treasurer of the railroad company made several applications to the treasurer of Pima county to pay the interest on these bonds but he refused to pay any interest, and the railroad company never received any money from the county treasurer or from anybody else on these bonds. That there were past-due coupons on the bonds of Pima county in 1886 when the first $50,000 of bonds were turned over to one W. W. Walker, who was an agent of Coler & Co., and that no interest had been paid on the bonds.

Afterwards two installments of $50,000 each of bonds of Pima county were delivered, and the findings state that (rec., p. 99):

"It is further found as a matter of fact that no more than ten or ten and one-half miles of the said road have ever been laid with ties and iron, and that no work was ever done on the said road except to lay ten miles with ties and iron, as above stated, and grade about twenty miles additional. It is also further found as a matter of fact that no passenger or freight trains were ever run over said road, and that after the delivery of the third $50,000 of said Pima County bonds, all work and operations on said road were abandoned and never resumed. That the ten miles out of Tucson which were laid with ties and iron were (not) ballasted except for a very little bit of the way. That the road was not very well graded and was not a well-made road. The earth was thrown up loose. It was a light sandy loan (loam) and did not hold. There was a certain grade for two or three hundred feet, and then there would be another grade and then at the end of that another grade."

The remaining findings of fact, omitting details of numbers of bonds and names of holders, are as follows:

VIII.

That the original stockholders of the road were not able to continue work on it after the grading done in 1883, and

suspended all operations after that time. That in March, 1886, these original stockholders turned over all the assets of the road to one W. W. Walker, on his agreement to complete the road in accordance with the said act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," and in accordance with the original intent of the company; that said W. W. Walker and his associates, Coler & Co., who were a firm of bankers and brokers of New York city, took the stock of said Arizona Narrow Gauge railroad and elected a new board of directors and new officers; that said W. W. Walker did not have sufficient means to build thirty miles of the said railroad and that Coler & Co. knew this fact; that said Walker was the representative and agent of said Coler & Co.; that Coler & Co. became stockholders of the Arizona Narrow Gauge Railroad Company on August 9, 1886, receiving one-third of the stock; that all the money for the building of the said ten miles and the grading of the twenty miles additional, amounting to $52,900.42, was transmitted by Coler & Co. to the Bank of Tucson for the credit of W. W. Walker, agent, and was all expended under the supervision and orders of one C. S. Coler, who was a nephew of W. N. Coler, and who was sent from the East to represent said W. N. Coler and to act as cashier and to sign all checks for all funds paid out in the construction of the said road. That said Coler & Co. made a contract with W. W. Walker in which Coler & Co. agreed to finance and build the first thirty miles of the said road and to pay over moneys as needed for construction expenses, but that after Coler & Co. had received $150,000 of Pima County bonds, being the 150 bonds involved in these mandamus proceedings, said Coler & Co. refused to proceed further on the lines originally agreed upon. That the said second and third $50,000 of said Pima County bonds were received from the county treasurer of Pima county by W. H. Culver, who was the president, and Charles E. Walker, who was the secretary, of said Arizona Narrow Gauge Railroad Company, and were by said Charles E. Walker packed, sealed and delivered to the express company for shipment to Coler & Co. in New York, and that the first installment of $50,000 Pima County bonds had been sent to Coler and Co. before May 18, 1886. That Coler & Co. agreed to pay for these bonds the price of 74¼

cents on the dollar and to pay the money over as needed for construction expenses, but Coler & Co. never rendered any account showing the amount of money advanced by them and for what purposes. That before Coler & Co. advanced any moneys in the work done on the ten miles which were laid with ties and iron and the twenty miles which were graded, W. N. Coler came to Tucson in person and investigated the condition of affairs and also sent an agent one J. Alden Gaylord, who in February or March, 1886, went to Globe, Arizona, over the route of the proposed road in order to examine into the feasibility of it and whether it would pay and that said Gaylord on May 11, 1886, wrote to W. N. Coler & Co. that "in accordance with your instructions" he had made a trip to Arizona in March and examined into the "particulars of the issues of $200,000 of bonds to the Arizona Narrow Gauge Railroad Company," and on March 27, 1886, addressed to the chairman of the board of supervisors of Pima county, the following letter:

"NEW YORK, *March* 27, 1886.

"Hon. J. S. MANSFELD,
Tucson, Chairman Board of Supervisors,
Pima County, Arizona Territory.

"MY DEAR SIR: This morning I wired you as follows: 'My report has been favorably considered. Negotiations just closed. Building of your railroad is now a fixed fact. I congratulate you,' all of which I hereby confirm. It gave me equally as much pleasure to send the above as I know it did you to receive it. I have great faith in the almost unbounded resources of your country, and the Narrow Gauge R. R. will be an important factor in developing them. It will in due course bring increased wealth, commerce and population to Tucson and Pima county, if your citizens do their part in encouraging these great commercial blessings, and of that I do not have the slightest doubt. My friends have ample means to build the road up to the 'thirty-mile post,' and it is safe for me to say that the work will be pushed vigorously, and the R. R. will be finished there during the summer. Beyond that point (thirtieth-mile post) you can readily understand that the extensions of it northwards to the mouth of the San Pedro (and still better to catch the immense carrying trade of Globe City) will depend very

largely on the liberality and wisdom of the people of Pinal and Gila counties to grant aid, and see the necessity of doing so promptly, which I feel assured they will do nobly when the proper time arrives. With this object in view, I trust you and the members of the board of supervisors will do all in your power officially and as good citizens to promote and prepare the way for this most important action, which is not only so vitally momentous for the future prosperity of Pinal and Gila, but your own county as well. Possibly I may be offered a directorship in the Narrow Gauge by my friends who are building it, and in that event I may be out and visit your hospitable city this winter coming, or before, and I feel that it almost goes without saying that you will do all you consistently can to assist me in this matter.

"In conclusion, I desire to thank you, the board, and all the citizens of Tucson and Pima for your kindness so cordially extended to me, by one and all, during my recent sojourn, and to assure you that I appreciated it most sincerely, and will never lose an opportunity to tell the truth here in the East (where so much misapprehension seems to exist), about the great resources of your country, as well as the courtesy, honesty and enterprise of its citizens.

"With great respect, I have the honor to be,

"Yours very truly, J. ALDEN GAYLORD."

IX.

That before the second and third delivery of $50,000 each of bonds of Pima county was made to the contractor, Coler & Co. were stockholders of the said Arizona Narrow Gauge Railroad Company and were holding and owning one-third of the stock of said railroad company, and at the time of the delivery of said $100,000 of said bonds the said contractor, one William W. Walker, who was engaged in constructing the said railroad, was the agent of William N. Coler, Sr., who was trading in the name of W. N. Coler & Co. That before the said W. N. Coler & Co. acquired the said bonds, they made inquiries of many persons, business men, officials, and others in Arizona recommending the said bonds, and the said W. N. Coler & Co. were informed in said letters that a road from Tucson to Globe would be a paying enterprise and that if said road were built it would in all probability be a paying investment. And said W. N. Coler & Co. before

the bonds were delivered to them or any moneys had been advanced by them for construction work on the said railroad, were fully informed as to all the facts connected with the issuance of the first $50,000 of bonds, and that the county of Pima had refused to pay interest on same and that the original stockholders of the said Arizona Narrow Gauge Railroad Company were unable to sell the $50,000 of bonds then in the possession of the treasurer of said Arizona Narrow Gauge Railroad Company and that the said company had abandoned the idea of doing any more work on the said railroad. That after the said bonds were delivered to W. N. Coler & Co. he sold the same to various parties at prices ranging from 94 cents on the dollar, to par. That one John Green holder of one of said bonds, Theodore Hill, holder of one of said bonds, Eva May Smith, holder of one of said bonds, Steven Tompkins holder of one of said bonds, and Emma L. Zabriskie, holder of four of said bonds have testified in this case that they bought the same without any knowledge of any defect and that they paid par for said bonds; that as the coupons came due on all of the said $150,000 of bonds and after Pima county had refused to pay any interest on any of said bonds, Coler & Co. advanced to the holders of the coupons on all of said bonds the amount of said coupons as they became due and retained and kept the said coupons and all of them, and that this was continued to the year 1896, and that all of the said coupons sought to be funded in this case are owned by the firm of Coler & Co. That the coupon falling due on July 1, 1887, on the said bonds of Pima county, was sent by Coler & Co. to the treasurer of Pima county for collection, and that the coupons falling due on said date from a number of these bonds were protested July 25, 1887, and the coupons falling due January 1, 1888, were also protested, and that Coler & Co. continued after the protest of said coupons to advance to the holders of the said bonds the amount of all the other coupons as they fell due semi-annually, all of which said coupons were retained and kept by Coler & Co., and are now the property of said firm. That prior to January 1, 1887, the firm of W. N. Coler & Co. was composed of W. N. Coler; that after January 1, 1887, and up to November 1, 1898, it was composed of W. N. Coler, Sr., and W. N. Coler, Jr., and that after November 1, 1898, Mr. Frank W. Coler became a member of the firm. That the said

firm of W. N. Coler & Co. are now the owners and holders of thirty of the said Arizona Narrow Gauge Railroad bonds, numbers 101 to 130 inclusive, and that the same were bought from the executors of one Elizabeth B. Voorhees under the following agreement: "April 11, 1899. Sold to W. N. Coler & Co. at private sale thirty, seven per cent. bonds, par $1,000 each, known as the Arizona Narrow Gauge bonds, being numbers 101 to 130 inclusive, issued by Pima county, Arizona, July, 1883, and repudiated by the county shortly after their issue. They have been the subject of litigation for several years which is still pending. Also five 6% par value $1,000 each, issued by the city of Langton, Elk county, Kansas, being numbers 1 to 5 inclusive, for all of which we received $11,000. Note: The Arizona Narrow Gauge Railroad bonds were in the possession of Coler & C., who claimed a lien upon them for *pro rata* shares of moneys advanced by them and expenses incurred in carrying on the litigation to establish their validity together with other bonds of the same issue. Her *pro rata* share amounted to $14,000. The Pima County bonds were in the actual custody of Coler & Co. April 11, 1899, the date of their sale as heretofore stated in Schedule A. Coler & Co. claimed a lien upon them which amounted to $14,000 or more for expenses of litigation in Arizona and elsewhere;" which agreement was signed and sworn to by the executors of the said Elizabeth B. Voorhees; that the said firm of W. N. Coler & Co. is also the holder and owner of seven more of the said bonds issued by Pima county; that W. N. Coler, Jr., is the holder and owner of sixteen of the said bonds of Pima county, and that when he purchased them he knew that the suit of Charles Edward Lewis *v.* Pima County had been decided by the Supreme Court of the United States, and that at the time of the purchase of the said sixteen bonds by William N. Coler, Jr., there was no market for them owing to the fact that they had been declared invalid in the said suit of Lewis *v.* Pima County. That the North American Loan & Trust Company is the holder and owner of five of said bonds of Pima county, which they acquired by an exchange of other bonds on April 1, 1896; that at such date one Leonard H. Hole, an attorney of law, was the president of said North American Loan & Trust Company, and that said Hole knew of the result of the suit of Charles Edward Lewis against Pima

County shortly after the decision was rendered in said case in 1894, and that on or about April 1, 1896, said Hole knew by report that work had been stopped on the Arizona Narrow Gauge railroad; that James L. Utter, one of the petitioners herein, is engaged in the business of buying and selling municipal bonds, and that he bought certain of these Pima County bonds from Coler & Co. and sold the same to other parties, and that the customers to whom said Utter sold the bonds delivered the coupons to Utter as said coupons fell due, and Utter paid the money on said coupons, and sent said coupons to Coler & Co., and received from Coler & Co. the money on all of said coupons down to about 1895 or 1896.

X.

That some of the purchasers of the said bonds from W. N. Coler & Co. sold and disposed of the same to other persons, and that some time after the passage of the act of Congress of June 6, 1896, the persons who then held all the said $150,000 bonds and coupons pertaining thereto, including among others, Elizabeth B. Voorhees, one of the petitioners in these proceedings, who owned subject to lien of Coler & Co. thirty of the said Pima County bonds, numbers 101 to 130 both inclusive, and James L. Utter, who owned absolutely in his own right four of said bonds, numbers 3, 11, 66 and 40, placed all these 150 bonds and the coupons pertaining thereto in the possession of the firm of W. N. Coler & Co., accompanied by the following written authority, signed by said persons, to wit:

"Messrs. W. N. COLER & Co.,
"New York City.

"GENTLEMEN: We herewith enclose you bonds number — amounting to $—— *will* full authority to deal with them in the same manner as all other bonds of said issue placed in your hands, and with authority to change the form of said indebtedness in such manner as you deem to the best interests of all bondholders, and accept in lieu thereof such new securities as in your judgment may be best, and we also agree to pay our proportional share of any and all expenses incurred by you in connection with this matter, it being understood however that nothing in this shall be construed as an obligation on our part to assume any expense

whatever in the event of your failure to secure a settlement or enforcement of this indebtedness.

"Yours truly, —— ——."

That all the moneys expended in the litigation in Arizona over the coupons of said bonds and the other expenses in connection with efforts to validate these bonds have been advanced solely by Coler & Co. and that the other owners of the bonds never brought any suit on the coupons and never joined in defraying the expenses of any suit.

That bonds 139, 145 inclusive now held by Coler & Co. were acquired by that firm prior to June 6, 1896, at a time when said bonds had no market value, and it is further found that except Elizabeth B. Voorhees, the other owners of these bonds have never been charged with any moneys advanced by Coler & Co. in regard to such bonds or expenses incurred by Coler & Co. in carrying on any litigation.

That W. N. Coler & Co., acting under and pursuant to the said authority transferred and delivered all the said bonds and coupons to James L. Utter and Elizabeth B. Voorhees, and to their attorneys, Leonard H. Hole and Barnes & Martin, in order that the said bonds and coupons might be presented to the board of supervisors of the county of Pima, and to the board of loan commissioners of the Territory of Arizona, for refunding under the provisions of the act of Congress of June 6, 1896. That it was the express understanding that when the said bonds were refunded the new refunding bonds should be delivered to the several holders of the old bonds and coupons *pro rata*, and that the holders of the old bonds and coupons should bear *pro rata* the charges and expenses of such presentation, but that Coler & Co. have advanced all the moneys for expenses connected with all the litigation over these bonds and the holders and owners of the old bonds are not to assume any expense in case the said bonds are not refunded. It was also the express understanding and agreement that the said James L. Utter and Elizabeth B. Voorhees, and their attorneys, had full authority to bring any suit or suits or mandamus proceedings which might be necessary in order to enforce the refunding of said bonds. The said James L. Utter and Elizabeth B. Voorhees expressly assented to this understanding and agreement and trust as to all the bonds and coupons. Pursuant to the said understanding and agree-

ment and trust as to all said bonds, all the said bonds and coupons were forwarded by express to Leonard H. Hole, attorney for said James L. Utter and Elizabeth B. Voorhees, and were by him received and taken to Arizona, and he, together with Barnes & Martin, attorneys-at-law in Arizona, presented said bonds and coupons to the board of supervisors of the county of Pima, and made a demand in writing on the said board of supervisors of said county that they report to the loan commission of the Territory of Arizona the said outstanding bonds and coupons and the indebtedness represented thereby, and that on the said board of supervisors failing to comply with their demands the said Leonard H. Hole and said Barnes & Martin presented the said bonds and coupons to the loan commissioners of the Territory of Arizona and made the demand upon them dated Phœnix, Arizona, December 14, 1896, which is set forth as Exhibit A to the petition in the pleadings in these mandamus proceedings, and on the refusal of the said loan commissioners to issue refunding bonds as demanded, the present mandamus proceedings were, pursuant to said understanding and agreement, begun and instituted in this court on the 31st day of December, 1896. That the said bonds and coupons on which these mandamus proceedings are brought, are as follows, to wit:

(*Form of Bond, Serial Number Omitted.*)

One thousand dollars. $1,000.00.

UNITED STATES OF AMERICA,

Territory of Arizona, County of Pima.

The County of Pima, in the Territory of Arizona, for value received promises to pay to the Arizona Narrow Gauge Railroad Company or bearer at the office of the treasurer of said county, in the city of Tucson, on the first day of July, A. D. one thousand nine hundred and three (1903) the sum of one thousand dollars, in lawful money of the United States, with interest thereon at the rate of seven per cent. per annum. Said interest payable at the office of the treasurer of Pima county, semi-annually, on the first day of January, and first day of July in each year

on presentation and surrender of the interest coupons hereto attached.

This bond is issued by the board of supervisors of said county of Pima under and by virtue of an act of the legislature of Arizona, entitled An act to promote the construction of a certain railroad, passed by the Legislative Assembly of the Territory of Arizona, and approved by the governor thereof the 21st day of February, A. D. 1883; and this bond is one of a series of two hundred issued in pursuance of said act, and exchanged for a like number of bonds of said railroad company of like amounts, bearing like interest, and running like time as the bonds of which this is one.

In witness whereof the said county, by its board of supervisors has caused this bond and the coupons hereto attached, to be signed by the chairman of the board of supervisors, and countersigned by the clerk of said board, and by the county recorder of the county of Pima; and the said clerk has affixed hereto the seal of the said county; and the said recorder has affixed hereto the seal of the said county recorder's office, this first day of July, A. D. 1883.

JAMES H. TOOLE,
Chairman Board of Supervisors.
WILLIAM J. OSBORNE,
Clerk Board of Supervisors.
CHAS. R. DRAKE,
County Recorder.

That petitioners own and hold one hundred and fifty of said bonds, numbered from 1 to 150 both inclusive.

That there are at present attached to each of said 150 bonds seven interest coupons not yet due, numbered 34, 35, 36, 37, 38, 39 and 40, each for the sum of $35.00 and to become due as follows, to wit:

Coupon No. 34, July 1st, 1900.
Coupon " 35, January 1st, 1901.
Coupon " 36, July 1st, 1901.
Coupon " 37, January 1st, 1902.
Coupon " 38, July 1st, 1902.
Coupon " 39, January 1st, 1903.
Coupon " 40, July 1st, 1903.

That the form of each of said coupons, except as to number of bond, number of coupon and date of maturity, is as follows, to wit:

Pima County Bond.

Coupon number —.

On the 1st day of ——, A. D. 1—, the County of Pima in the Territory of Arizona, will pay to the bearer, at the county treasurer's office, at Tucson, thirty-five dollars ($35.00) being interest due on bond numbered —.

JAMES H. TOOLE,
Chairman Board of Supervisors of Pima County.
WILLIAM J. OSBORN,
Clerk Board of Supervisors of Pima County.
CHAS. R. DRAKE,
Recorder of Pima County.

That petitioners also own and hold three thousand eight hundred and ninety-one (3,891) like coupons, each for the sum of $35.00 clipped from said 150 bonds, and being coupons numbered 8 to 33, both inclusive from each of said 150 bonds, and due respectively:

Coupon No. 8, July 1st, 1887.
Coupon " 9, January 1st, 1888.
Coupon " 10, July 1st, 1888.
Coupon " 11, January 1st, 1889.
Coupon " 12, July 1st, 1889.
Coupon " 13, January 1st, 1890.
Coupon " 14, July 1st, 1890.
Coupon " 15, January 1st, 1891.
Coupon " 16, July 1st, 1891.
Coupon " 17, January 1st, 1892.
Coupon " 18, July 1st, 1892.
Coupon " 19, January 1st, 1893.
Coupon " 20, July 1st, 1893.
Coupon " 21, January 1st, 1894.
Coupon " 22, July 1st, 1894.
Coupon " 23, January 1st, 1895.
Coupon " 24, July 1st, 1895.
Coupon " 25, January 1st, 1896.
Coupon " 26, July 1st, 1896.
Coupon " 27, January 1st, 1897.
Coupon " 28, July 1st, 1897.
Coupon " 29, January 1st, 1898.

Coupon No. 30, July 1st, 1898.
Coupon " 31, January 1st, 1899.
Coupon " 32, July 1st, 1899.
Coupon " 33, January 1st, 1900.

Except the following coupons, which are not produced by petitioners, to wit:

Coupons No. 14 from bonds Nos. 84, 85, 86, 88 and 90, due July 1, 1890.
Coupon No. 15 from bond No. 17, due January 1, 1891.
Coupon No. 22 from bond No. 93, due July 1, 1894.
Coupon No. 24 from bond No. 19, due July 1, 1895.
Coupon No. 25 from bond No. 19, due January 1, 1896.

XI.

That after the contract entered into with W. W. Walker and the transfer by the original stockholders of the Arizona Narrow Gauge Railroad Company of all the assets of the company including the first $50,000 of bonds of Pima county, there was no money in the treasury of the said Arizona Narrow Gauge Railroad Company, and the moneys for the work done on the said ten miles after the contract with said W. W. Walker as agent of Coler & Co. were not disbursed by the treasurer of the Arizona Narrow Gauge Railroad Company, but were all paid out by C. S. Coler as the representative and disbursing agent of W. N. Coler & Co. That the said Arizona Narrow Gauge Railroad Company never paid any interest on the bonds of said railroad company held by Pima county, and that the said Arizona Narrow Gauge Railroad Company never had any money with which to pay such interest and that all the said bonds of said railroad company held by Pima county were at all times and now are worthless. That for one year after 1886 taxes were paid on the property of the Arizona Narrow Gauge Railroad Company by W. N. Coler & Co., but that no taxes were paid after that time, and that W. N. Coler & Co. were notified that the taxes were unpaid and were notified of everything going on in Tucson.

XII.

That the said first-mortgage bonds of the said Arizona Narrow Gauge Railroad Company which were exchanged

for the $150,000 bonds of Pima county were duly made and executed by the said company, were secured by deed of trust or mortgage to at least two trustees of all the property, real and personal, owned by said railroad at the time of the issuance of said bonds, or might thereafter be acquired, including also all franchises and privileges of whatsoever kind or nature, and which said deed of trust or mortgage was the first made of or on said property, and said bonds of said company were issued in the name of said company, and were made payable to bearer twenty years after date, and have interest coupons thereunto attached, and were made payable both principal and interest at the office of said company in the city of Tucson, in the county of Pima, and said deed of trust or mortgage provided that no more bonds than to the amount of $13,000 per mile to be secured by said deed of trust or mortgage should be issued by said railroad company, and the said first-mortgage bonds of said railroad company were likewise in all other respects made, issued and delivered in full conformity to all the provisions of the said act of the legislature of the Territory of Arizona approved February 21, 1883, entitled "An act to promote the construction of a certain railroad."

The court rendered its opinion (rec., p. 80), holding that in the case of Utter *v.* Franklin, *supra*, the records of the supreme court of Arizona show that the demurrer to the petition was sustained and the petition dismissed; that the judgment of the supreme court of Arizona, where this cause originated, disclosed that the judgment of that court, from which the appeal was taken to the Supreme Court of the United States, was rendered upon the issue of law raised by the demurrer and not upon any issue of fact raised by the original return, and that the mandate of the Supreme Court of the United States, reversing the cause and remanding it to the supreme court of Arizona "for proceedings not inconsistent with the opinion," made it the duty of the supreme court of Arizona to consider and decide any issue of fact properly pleaded which amounts to a defense and which is not, in fact, decided by the Supreme Court of the United

States in passing upon the issue of law presented by the demurrer, and that the issue of fact raised by the amended return involved the question as to whether the bonds were exchanged by the county of Pima for the bonds of the Arizona Narrow Gauge Railroad Company in good faith and in compliance with the act of the territorial legislature of February 21, 1883.

The court stated in its opinion (rec., p. 81):

"The defendants now present two objections to the granting of the writ of mandate which arise out of facts that did not exist at the time the case was heard in this court on the demurrer. These are, first, that the action was begun against Benjamin J. Franklin, governor, C. P. Leitch, auditor, and C. M. Bruce, secretary, and that each of the defendants has long since been superseded in office by another person, and that therefore the action should abate. Second, that the loan commission has ceased to exist by repeal of the statute creating the same, and no provision was had in the repealing statute reserving from its operation pending proceedings, and that therefore the action must abate because there is no officer or person upon whom the duty rests to fund the bonds in question, or against whom the writ of mandate may be enforced."

As to these points the court held, first, that "the loan commissioners were by the statute made a continuing body, and the delinquency complained of related to a continuing duty of the commission," and therefore that this action has not abated by the fact that the original defendants had been superseded in office.

As to the second point, the court held that the act of the Territory of Arizona appearing as title XXXI of the Revised Statutes of Arizona of 1887 (which act is set out in full in the appendix to this brief), providing for the creation of a commission to be known as the loan commission and the funding by this commission of the outstanding and existing indebtedness of the Territory, was repealed and

superseded by the act of Congress of June 25, 1890, the first provision of which act is as follows:

"An act approving, with amendments, the funding act of Arizona.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the act of the Revised Statutes of Arizona of eighteen hundred and eighty-seven, known as 'title XXXI—funding,' be, and is hereby, amended so as to read as follows, and that as amended the same is hereby approved and confirmed, subject to future territorial legislation."

This act of Congress, the lower court held, "is now the paramount law upon the subject of funding, and became a part of the organic law of the Territory of Arizona to the extent, at any rate, that it may not be changed so as to render any of its provisions inoperative by any act of the territorial legislature, except with the express consent of Congress."

The court further construed act No. 32 of the Laws of Arizona of 1899, entitled "An act to abolish the loan commission and to repeal sundry laws relating thereto" (set out in full in the appendix hereto), and held that, "irrespective of the question of the power of the territorial legislature to repeal the congressional act creating the loan commission, it is more than doubtful that the act of 1899 (No. 32, above cited) can be construed so as to effect that result."

Further considering the facts, the court held that there had been a compliance with the terms of the act of the legislature under which the bonds were issued, and that they should be funded, and entered judgment to that effect (rec., p. 113).

Respondents filed a motion for a rehearing on the ground that the opinion was opposed to former decisions of the supreme court of Arizona and of this court. This motion

being overruled, respondents were allowed and duly perfected their appeal to this court.

The appeal presents the two questions:

1st. Has the loan commission been abolished?

2d. If not, should these bonds be funded?

SPECIFICATION OF ERRORS.

The court erred in not holding that the loan commission of Arizona had been abolished prior to the judgment herein and in not holding that at the date of such judgment there was no loan commission and no loan commissioners against whom any judgment could be rendered or enforced.

The court erred in holding that the bonds and coupons sought to be funded herein were sold or exchanged in good faith.

The court erred in holding that there was not a failure of consideration as to the bonds and coupons sought to be funded herein and in not holding that the failure to build, complete, and operate the Arizona Narrow Gauge Railroad Company, to which company said bonds and coupons were issued, was a failure of consideration as to the bonds and coupons so issued by Pima County and sought to be funded herein.

The court erred in not sustaining defendants' plea of the statute of limitations to the coupons sought to be funded herein.

The court erred in allowing interest on the coupons funded herein.

The court erred in rendering judgment for plaintiffs for the reason that it appears by the evidence herein that plaintiffs have no right to sue except for the bonds and coupons owned by them personally, and because it further appears that no authority was given by the owners of the bonds, which were not owned by plaintiffs, under which plaintiffs were author-

ized to bring suit on any bonds not owned by them, and because the agreement by which the firm of Coler & Co. and plaintiffs undertake to carry on this litigation, and advance all costs and expenses, and to save the owners of the various bonds harmless from any such costs and expenses in case of a failure to secure a settlement or enforcement of the alleged indebtedness represented by said bonds, is illegal and void and contrary to public policy and not enforceable in the courts.

Because the findings of fact as found by the court herein are insufficient to support the judgment, and the judgment and decision are contrary to law for the reason that it fully appears from said findings of fact that the bonds and coupons sought to be funded herein were not sold or exchanged in good faith in accordance with the act of the legislature of Arizona, approved February 21, 1883, under which act said bonds and coupons were issued.

POINTS AND AUTHORITIES.

I.

The writ of mandamus will not issue where it would prove nugatory or unavailing, and parties who have no duties in the premises or whose terms of office have expired or whose offices have been abolished cannot be made respondents in proceedings by mandamus.

Mackey, *ex parte*, 15 S. C., 322.
State *v.* Gibbs, 13 Fla., 55.
State *v.* Steen, 43 N. J. L., 542.
State *v.* Archibald, 43 Minn., 328.
State *v.* Waterman, 5 Nev., 323.
Lamar *v.* Wilkins, 28 Ark., 34.
Mason *v.* School Dist., 20 Vt., 487.
Barkley *v.* Levee Commissioners, 3 Otto (U. S.), 258.

Commonwealth *v.* Commissioners of Hampden, 6 Pick., 500.

People *ex rel.* Commissioners of Transportation *v.* The Central Pacific R. R. Co., 62 Cal., 506.

II.

It is immaterial that the act sought to be coerced by mandamus was a legal duty at the commencement of the proceedings. If it has been subsequently forbidden by law, the writ will not be awarded.

2 Spelling on Extraordinary Remedies, sec. 1378.

Hall *v.* Steele, 82 Ala., 562.

People *v.* Monroe, Oyer & Terminer, 20 Wend., 108.

III.

The loan commission of Arizona was established by the Territory under the authority of legislative act of March 10, 1887.

Revised Stat. of Arizona, 1887, title XXXI.

Utter *et al. v.* Franklin *et al.*, 172 U. S., 416–419.

This was within the legislative power of the Territory which, under the organic law, "extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

Revised Stat. U. S., sec. 1851.

Clinton *v.* Englebrecht, 13 Wall., 434.

Coulter *v.* Stafford, 56 Fed., 564.

IV.

The organic law of Arizona specifically authorizes the legislature to do what it pleases as to funding. Section 3 of the act of Congress of July 30, 1886 (Rev. Stat. of Arizona, 1887, p. 37), provides that "nothing in this act shall be construed

to prohibit the refunding of any existing indebtedness of such Territory or of any political or municipal corporation, county or other subdivision thereof."

By this act of July 30, 1886, Congress intended to confer on the various territorial legislatures plenary power to legislate as they deemed expedient with reference to funding.

Lawrence Co. *v.* Jewell, 100 Fed., 905.

V.

Although Congress has the undoubted power to annul or modify at its pleasure the statutes of a Territory of the United States, yet an intention to supersede the local law is not to be presumed unless clearly expressed.

France *v.* Connor, 161 U. S., 65.

VI.

The act of Congress of July 25, 1890, entitled "An act approving with amendments the funding act of Arizona," did not change the territorial act into a congressional one.

Miners' Bank of Dubuque *v.* Iowa, 53 U. S., 12 How., 107.

Lyon *v.* Woods, 153 U. S., 661.

Irwin *v.* Irwin, 37 Pac., 548.

Martin *v.* Territory, 56 Pac., 712.

Schuerman *v.* Territory, 60 Pac., 895.

VII.

The statutes of Arizona, title XXXI, 1887, creating the loan commission, were retained and re-enacted in the act of Congress of June 25, 1890. The effect, therefore, is not to repeal and re-enact the portion retained, but such portion continues in force from the time of the first enactment. A new statute should be construed as a continuation of the

old one, with the modifications contained in the new one, although it formally repeals the old statute, when it re-enacts its substantial provisions and the two statutes are almost identical.

Bear Lake and R. Waterworks and I. Co. *v.* Garland, 164 U. S., 1.
Moore *v.* Mausert, 49 N. Y., 332.
Ass'n *v.* Benshimel, 130 Mass., 327.
State *v.* Bemis, 64 N. W., 348.
Callahan *v.* Jennings, 27 Pac., 1055.
State *ex rel.* Birdsey *v.* Baldwin *et al.*, 45 Conn., 134.
Sternberg *v.* State, 69 N. W., 849.
Sutherland Stat. Con., sec. 133.
Black on Interpretation of Laws, sec. 359.

Where an amendment is made by declaring that the original statute "shall be amended so as to read as follows," retaining part of the original statute and incorporating therein new provisions, the effect is not to repeal and then re-enact the part retained, but such part remains in force as from the time of the original enactment, while the new provisions become operative at the time the amendatory act goes into effect, and all such portions of the original statute as are omitted from the amendatory act are abrogated thereby, and are thereafter no part of the statute.

Ely *v.* Holton, 15 N. Y., 595.

VIII.

Nothing is better settled than that repeals, and the same may be said of annulments, by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one, unless so clearly repugnant thereto, as to admit of no other reasonable construction.

Cope *v.* Cope, 137 U. S., 682.

To repeal an act by necessary implication it is not sufficient to establish that subsequent laws cover some or even all the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary; but there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy.

Daviess *et al. v.* Fairbairn *et al.*, 3 How., 636, citing Wood *v.* U. S., 16 Pet., 362.

Repeal by implication is not favored in law. It is held to occur only where different statutes cover the same ground, and there is a clear and irreconcilable conflict between the earlier and the later. The rule as thus stated is so well settled that discussion and the citation of authorities are unnecessary.

Wood Co. *v.* Lackawanna Iron & Coal Co., 3 Otto, 619.

IX.

Statutes relating to the same thing are *in pari materia*, no matter when they were passed, and are to be construed together as though enacted at the same time.

State *v.* Gerhardt, 145 Ind., 439.
Potter Dwar. St., 145.
Vane *v.* Newcombe, 132 U. S., 220.
Black on Interpretation of Laws, p. 204.
Board of Com'rs *v.* Ætna Life Ins. Co., 90 Fed., 222.

A statute amending a former act operates as to matters thereafter occurring precisely as if the amendatory statute had been added to the prior act at the time of the latter's adoption, and the two acts must be considered together and

as one statute. The amendment becomes a part of the original act.

Holbrook *v.* Nichol, 36 Ill., 161.
Peters *v.* Vawter, 25 Pac., 438.
Ludington's Case, 15 Ct. Cl., 453.

X.

The various funding laws of Arizona merely conferred a privilege on holders of bonds to have them funded, and created no contract that this should be done, and the offer could lawfully be withdrawn.

Durkee *v.* Board of Liquidation, 103 U. S., 646.

These laws were only a means by which the Territory could execute its own policy or transact its own business, and might lawfully be altered or repealed at pleasure. Such funding arrangements are not a contract, but a mere legislative regulation.

Board of Com'rs *v.* Ætna Life Ins. Co., 90 Fed., 222, 227.
Durkee *v.* Board of Liquidation, *supra.*
San Francisco *v.* Beideman, 17 Cal., 443.
South Carolina *v.* Gaillard, 11 Otto, 433.
Bank *v.* Knoop, 16 How., 408.
Cooley Constitutional Limitations, 145.
Dillon's Municipal Corporations, sec. 69.

The rule is that in modes of proceeding and of forms to enforce the contract the legislature has the control and may enlarge, alter, or limit them, provided that it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of that right. A person has no vested right in a remedy conferred by statute to prevent the law-making power from modifying such remedy or

adding new conditions to its exercise or withdrawing it entirely.

Tennessee *v.* Sneed, 96 U. S., 69.

Brainard *v.* Hubbard, 12 Wall., 1.

Covington & L. R. Co. *v.* Clinton County Court, 12 B. Mon., 144.

XI.

Act No. 32 of the legislature of Arizona of 1889, entitled "An act to abolish the loan commission and to repeal sundry laws relating thereto," abolished the loan commission without reserving any pending proceedings from the operation of the repealing statute, and the present action must abate, because there are no officers or persons upon whom the duty rests to fund the bonds in question or against whom the writ of mandate may be enforced.

If there were any doubt as to the meaning of this act, it would be removed by the title, which shows that the purpose of the act was "to abolish the loan commission."

Coosaw Mining Co. *v.* State of South Carolina, 144 U. S., 550, citing the cases.

ARGUMENT.

The first of the two points on which appellants chiefly rely is that this action has abated, because the loan commission of Arizona was abolished prior to the judgment herein, and there are now no persons upon whom the duty rests to fund the bonds in question or against whom the writ of mandate may be enforced.

This point involves a consideration of the various territorial and congressional acts relating to funding. These acts have been before the lower court in several cases, Schuerman *et al. v.* Territory, 60 Pac., 895; Gage *v.* McCord, 51 Pac., 977; Bravin *v.* City of Tombstone, 56 Pac., 719, but

none of these decisions were referred to in the opinion in the present case.

As to the first of our two main points we shall endeavor to establish the following propositions:

1. That the loan commission was not created by the congressional act, but originally derived its authority from the territorial act, and that it continued to exist by virtue of that act and not by reason of any legislation of Congress.

2. That act No. 32 of the Laws of Arizona of 1899 specifically abolished the commission.

I AND II.

If the loan commission was abolished prior to the judgment herein it seems clear that this action has abated, and that the case should be reversed and remanded, with directions to dismiss the petition.

III.

The loan commission was established under the authority of the legislature of Arizona on March 10, 1887 (Revised Stat. of Arizona, 1887, title XXXI, p. 361, as set out in full in the appendix to this brief), the first paragraph creating the commission being as follows:

2039. (SEC. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona, the governor of the said Territory, together with the territorial auditor and territorial secretary and their successors in office, shall constitute a board of commissioners to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

As to this it would seem that there can be no possible doubt. This court stated when this case was before it in Utter *v.* Franklin, *supra*, that the act of the legislature of Arizona, above cited, is the "authority under which the loan commissioners were appointed." Their appointment is by virtue of paragraph 2039, above quoted. All the other paragraphs of the act simply set out their powers and duties.

The lower court in its opinion speaks of the "congressional act creating the loan commission." This suggestion, however, is entirely unfounded. The Territory, not Congress, created the commission. The lower court so decided in former cases, its language in Schuerman *v.* Territory, *supra*, being as follows: "The act (title XXXI, Rev. Stat. of Arizona, 1887), being a territorial act and the commission being the creation of the Territory," etc.

It is clear that if no superior power has intervened the same authority, viz., the Arizona legislature, which created the commission, could abolish it. The act of 1887 fixed no term for the commission, and as there was no constitutional prohibition against discontinuing the board, it could be entirely abolished by the legislature. The repeal of paragraph 2039 would have ended its existence. The legislature created the office, and it had full power to abolish or change it. Undoubtedly, as a general proposition, a State or Territory may abolish any public office created by a public law of its own. One legislature is competent to repeal any act which a former legislature was competent to pass (Fletcher *v.* Peck, 6 Cranch, 87; Newton *v.* Commissioners, 100 U. S., 559).

This creation of the loan commission by the Territory of Arizona was within the legislative power, which "extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." To use the reasoning and language of this court in Clinton *v.* Englebrecht, 13 Wall., 434, "As there is no provision relating to" funding "in the constitution or the organic act, it cannot be said that

any legislation upon this subject is inconsistent with either." The matter of funding was, therefore, a rightful subject of legislation, and the territorial statute was a valid act regulating the financial policy of the Territory.

Lawrence Co. *v.* Jewell, 100 Fed., 905.

Argument, however, is not needed as to this point, because the organic law specifically authorizes the legislature to do what it pleases as to funding. Section 3 of the act of Congress of July 30, 1886 (Revised Stat. of Arizona, 1887, p. 37), provides that "nothing in this act shall be construed to prohibit the refunding of any existing indebtedness of such Territory or of any political or municipal corporation, county or other subdivision thereof."

This act was fully and carefully considered and construed by the circuit court of appeals, eighth circuit, in Lawrence County *v.* Jewell, *supra*, in which the court said, referring to the concluding clause, above quoted, of section 3:

"On the other hand, counsel for the bondholders contend broadly that Congress intended by the language above quoted to leave the Territories and each of the political subdivisions thereof at full liberty to refund any of their indebtedness which existed on July 30, 1886, as they thought best; and to leave the territorial legislatures at liberty to legislate as they deem proper relative to the refunding of any existing debts, provided the power to refund was exercised in good faith. We are of opinion that the latter view of the act is supported by the better reasons, and that it should prevail. It is noticeable that the power to refund existing debts was conferred upon the various political subdivisions of the Territories in the most general terms, and that the clause conferring that power serves to qualify every other provision contained in the act. * * * Congress intended to confer on the various territorial legislatures plenary power to legislate as they deemed expedient with reference to the settlement of such obligations. It was the intent of Congress to leave the past fiscal acts of municipal corporations in the Territories, and the power of the territorial legislature to deal with the same, wholly unaffected by the

act." * * * "It must be presumed that when Congress declared, as in the act of July 30, 1886, that it should not be construed 'to prohibit the refunding of any existing indebtedness,' that had been contracted by the various political subdivisions of the Territory, it intended to leave them at full liberty to refund their debts in any of the customary ways in which such an operation might be accomplished, and to place no restrictions upon acts done in that behalf, save the restriction that the operation should be undertaken and pursued in good faith, for the sole purpose of retiring an existing debt. Any other view of the act under consideration would render the power to refund, which Congress clearly intended to confer, of little practical value. * * * The act of Congress * * * in express terms left the counties at liberty to refund the old debts in any way that that end could be accomplished with the sanction and approval of the territorial legislature. * * * The territorial legislature possessed that authority (the power to pass refunding laws) prior to the act of July 30, 1886, and it does not seem to have been the purpose of Congress to withdraw the authority, or to place restrictions upon the exercise of any legislative power which it might be found expedient to exercise for the purpose of enabling any county or municipality of the Territory to adjust, compound and liquidate its antecedent liabilities. The power to legislate to that end remained as it was before the act of July 30, 1886, was passed."

We submit that it is apparent that Congress intended to give and did give to the various territorial legislatures plenary—that is, full, entire, complete, absolute—power as to funding, and did not place restrictions upon the exercise of any legislative power by the Territories as to this subject. This plenary power of funding would include the power in the territorial legislature to create such a funding commission as it thought best, would include the power to add to or modify the duties of the commission, and, of course, the power to abolish the commission which it had created.

This being the fixed and long-established policy of Congress, amendatory acts are to be construed with reference to the existing system of laws on the subject to which they

pertain, and, if possible, to be construed as parts of that system and in harmony with that long-established policy. (U. S. *v.* Jessup, 15 Fed., 790; Yuengling *v.* Schile, 12 Fed., 97; Wilmot *v.* Mudge, 103 U. S., 217–220.)

Such a construction as will leave the territorial legislatures with plenary power as to funding will be in harmony with that system, while any construction which takes this power from the legislatures, or imposes any restrictions on its exercise, will be out of harmony.

An examination of the acts themselves will show, as it is confidently submitted, that they are all in harmony with this established policy. These acts we will consider seriatim.

The first one after the Arizona statute of 1887 is the act of Congress of June 25, 1890 (26 Stat. at L., 175). This act provides "that the act of the Revised Statutes of Arizona of 1887, known as 'Title XXXI—Funding,' be, and is hereby, amended so as to read as follows, and that as amended the same is hereby approved and confirmed, subject to future territorial legislation."

Title XXXI is set out in full in the appendix to this brief, and when it is compared with the congressional act of 1890 it will be seen that the amendments are unimportant and chiefly verbal. A careful comparison of the two acts shows that the only changes, excluding wholly immaterial ones, are that the rate of interest is changed from not to exceed six and a half per cent. to five per cent. (par. 2041); that the order of the territorial auditor shall be "countersigned by the governor" (par. 2044); that "before any such indebtedness shall be paid the territorial auditor shall endorse on each certificate the amount due thereon," etc.; "ten years after such bonds shall have been issued" is changed to "fifty years" (par. 2047), and to this section is added the proviso, "Nothing herein shall be construed to prevent the legislature of Arizona from creating a sinking fund during the life of said bonds for their redemption at maturity;" to paragraph 2048 is added the provision whereby county,

municipal, and school indebtedness may be refunded upon demand of the proper authorities, and after the last paragraph of title XXXI is added the clause providing that "present and outstanding indebtedness, together with such warrants as may be issued for the necessary and current expenses of carrying on territorial, county, municipal, and school government for the year ending December 31, 1890, may also be funded and bonds issued for the redemption thereof."

These are all the changes except the verbal ones by which the commission was given the power to fund not only outstanding and existing indebtedness, but also such future indebtedness as may be or is now authorized by law.

The act of 1890 is thus identical with title XXXI of the Revised Statutes of Arizona, except for these verbal changes, and except for the provisions for funding county and other indebtedness and accruing indebtedness up to December 31, 1890. The territorial legislature, by virtue both of its general powers as to all rightful subjects of legislation and also by the act of July 30, 1886, had, prior to the act of 1890, full power to fund all county, municipal, and school indebtedness, and could have included such indebtedness in the original title XXXI if it had been so inclined, and the concluding proviso of the congressional act was simply a permission to the Territory to fund indebtedness which had accrued in excess of the limitations of the Harrison act. There would appear to be absolutely nothing in this act of June 25, 1890, which takes from the Territory its plenary power as to funding, and nothing from which any valid argument can be made that Congress intended to depart from its policy of leaving the whole subject of funding entirely within the will of the legislatures.

The amendment and approval by Congress of this Arizona statute creating the loan commission did not make it a congressional act or take from Arizona the power to repeal title XXXI as amended by the act of 1890. We submit

that this rule has been expressly declared by this court in Miners' Bank of Dubuque *v.* Iowa, 53 U. S., 12 How., 107, the facts and reasoning in which appear to constitute a controlling precedent. In that case the territorial legislature of Wisconsin chartered the Miners' bank. Afterwards an act of Congress annulled the charter in certain particulars, but left other of its provisions in force. Thereafter the Territory was divided by act of Congress, and the Territory of Iowa was erected over that part of the former Territory of Wisconsin in which the bank was situated. Later, the territorial legislature of Iowa repealed the charter, and directed the settlement of the affairs of the corporation by trustees under the supervision of the court. A *quo warranto* proceeding was instituted against the bank. In deciding the case on appeal, this court used this language:

"It has been argued in this case that as Congress, in creating the territorial governments of Wisconsin and Iowa, reserved to themselves the power of disapproving and thereby annulling the acts of those governments, and had, in the exercise of that power, stricken out several of the provisions of the charter of the Bank of Dubuque, enacted by the legislature of Wisconsin, assenting to the residue, that therefore the charter of this bank should be regarded as an act of Congress rather than of the territorial government. * * * The fallacy of this argument is easily detected. Congress, in creating the territorial governments and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves, whilst for considerations equally strong they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. A different system of procedure would have been fatal to all practical improvements in those Territories, however urgently called for; nay, might have disarmed them of the very power of self-preservation. An invasion, or insurrection, or any other crisis demanding the most strenuous action, would have had to remain without preventive or remedy, till Congress, if not

in session, could be convened, or when in session, must have awaited its possibly procrastinated aid.

"The argument would render also the acts of the territorial governments, even the most wholesome and necessary and though indispensably carried to the extreme of authority, obnoxious to the charge of usurpation or criminality. The reverse of this argument, whilst it is accordant with the investiture of general legislative power in the territorial governments, places them in the position of usefulness and advantage towards those they were bound to foster, and subjects them at the same time to proper restraint from their superiors. The charter of the Bank of Dubuque enacted in all its details and powers ever possessed by it (and according to which it was in fact organized), by the legislature of Wisconsin, must be looked upon as the creature of that legislature. To regard it, as we are urged to do by the arguments of the plaintiff in error, would constitute it rather a bank of the United States, situated without the United States, and operating within the Territory of Wisconsin, now the State of Iowa, independently of the power or local policy of that State, and beyond the reach of its faculties or obligations to be exerted for its own citizens. * * * We regard both the charter granted by Wisconsin, and the repeal of that charter by Iowa, alike as acts of the territorial authorities."

In the case of U. S. *v.* Church, 15 Pac., *supra*, affirmed by this court on appeal, 136 U. S., 1, it appears that an act of the Territory of Utah had been disapproved and partly annulled by subsequent action of Congress, and it was contended that inasmuch as Congress had thus acted changing the territorial statute, therefore the remainder of the charter was made an act of Congress. But the court held otherwise, saying that no such intention was expressed, and that so much of the charter as remained in force did not become in effect a law of the United States.

Miners' Bank of Dubuque *v.* Iowa was followed and approved in Lyons *v.* Woods, 153 U. S., 661, in which the court quoted the foregoing language in full and also restated the familiar rule that it must be presumed that all laws passed

by a Territory were duly submitted to Congress and not being disapproved were thereby sanctioned.

In the case of Irwin *v.* Irwin, 37 Pac., 548, the supreme court of Oklahoma held that the act of Congress ratifying the law of the territorial legislature granting to probate courts jurisdiction in actions for divorce was in the nature of permissive legislation, and did not take from the legislature the power to repeal such act, and in arriving at its conclusion the court used the following language, which seems to be fully applicable to the present consideration:

"It will be seen that this act emanated first from the legislature; that it was a thought or purpose which had no place in the mind of Congress until presented to that body by the people of this Territory through its chosen body, the legislature. The law never would have had an existence as an independent creation by Congress. We regard the action of Congress as being in the nature of a license to the legislature of this Territory, as of not having been intended as a command, but as a permission, and that the law should have no greater effect than a law of our legislature; that Congress did not, by ratifying the legislative enactment, place it without the power of such legislature to repeal the same; and, this being true, it follows that, where the act was repealed, such repeal carried with it the jurisdiction of the probate courts."

In Martin *v.* Territory, 56 Pac., 712, the supreme court of Oklahoma say:

"The sound rule would seem to us to be that, when a legislative enactment requires the ratification by Congress before it can become effective as a law, and it is ratified, then the legislature has no power to effect its repeal, but if a statute is within the legislative power, its subsequent ratification not being required to give it validity, such ratification would not prevent the legislature from changing such statute, and this seems to be the effect of the reasoning and authorities cited in Irwin *v.* Irwin, 41 Pac., 369."

This case of Miners' Bank *v.* Iowa seems to us an exact authority. What it holds is that where a territorial act within the power of the Territory to pass in the first instance has been revised by Congress, so much of the act as is not disapproved remains a territorial act, and may be repealed by the Territory. Under this reasoning all of the statute of 1887 which was not modified by the congressional act remained an act of the Territory and could be repealed by it, and this includes the paragraph creating the commission. The fact that the act of 1890 suggests some additions which the Arizona legislature might adopt if it chose, so much the more strongly shows that the act was a territorial act, because Congress did not attempt to make any unconditional change in it. These additions came into force not by virtue of the congressional act, but because of the pleasure of the legislature in adopting them with such modifications as it saw fit to make.

We think that the present case, where the territorial act was approved with amendments, is even stronger than where, in the Miners' Bank case, part of the act was so obnoxious as to be disapproved. The act of 1890 made suggestions as to a change in the rate of interest and the time the bonds are to run, but we suppose that no one would seriously argue that this changed the act from a territorial to a congressional one. It was suggested, moreover, as has been heretofore stated, that municipal and other obligations might also be funded, but all this was fully in the power of the legislature by the organic law. Congress waived the provisions of the Harrison act as to certain indebtedness issued in excess of the limit, and gave the Territory the right to fund such indebtedness if it saw fit; but where, under the authority of the Miners' Bank case, is there anything changing the territorial act into a congressional one? The supreme court said in that case: "The charter of the Bank of Dubuque enacted in all its details and powers ever possessed by it (and according to which it was in fact

organized), by the legislature of Wisconsin, must be looked upon as the creature of that legislature." The loan commission was the creature of the legislature of Arizona by the act of 1887 and remained under legislative control.

This construction of the act of 1890 is, we submit, in accord with the well-established relation between the Territories and Congress.

In Clinton *vs.* Englebrecht, 13 Wall., 418, *supra*, this court said:

"The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress."

The creation of the loan commission was, as we have endeavored to show, a matter of self-government within the rightful exercise of the legislative authority. What reason is there to hold that Congress intended to take from the Territory the subsequent control of the commission? Such a commission is a matter of policy, useful, perhaps, in one Territory and not in another, and useful, if at all, only for a limited time. In the very nature of the case it is likely to be temporary. It was created because the legislature of Arizona thought it wise to do so, and the same legislature has thought it wise to discontinue it.

This court says in the Miners' Bank case that unless the Territory has the power to repeal the body which it has created, "some crisis demanding the most strenuous action would have to remain, without preventive or remedy, till Congress, if not in session, could be convened, or, when in session, must have awaited its possibly procrastinated aid."

If the Arizona legislature was of the opinion that the best interests of the Territory demanded the abolishment of the loan commission could it not discontinue it? The Territory

did pass act No. 78 of the Nineteenth Legislative Assembly, Laws of 1897, p. 140 (set out in appendix), "limiting the expense of the loan commission of the Territory of Arizona." Such action shows that the legislature regarded the commission as under its control. If the legislature thought best to save all the expense of the commission by discontinuing it, could it not have done this as well?

"An intention on the part of Congress to supersede the local territorial law is not to be presumed unless clearly expressed" (France *v.* Connor, 161 U. S., 65, *supra*).

To hold, by implication, that Congress has prohibited the legislature of Arizona from abolishing the tribunal which it created, would seem to say, in the language of the supreme court of Wyoming in France *v.* Connor *et al.*, 27 Pac., 569-575, that "Congress had set aside, without reason, and by inference and implication, the great right of home rule, of dealing with 'rightful subjects of legislation,' vested in territorial legislatures and only withdrawn in extreme cases." Such reasoning seems to be that the legislature under our organic law had a right to establish the loan commission and then, under what is assumed to be further organic law, had no right to discontinue it.

That the funding act remained a territorial act, even after the passage of the congressional act of June 25, 1890, was announced by the lower court in Schuerman *v.* Territory, 60 Pac., 895, *supra*. In arriving at its judgment in that case the court said:

"There is no provision in the funding act of 1887, as amended by Congress in 1890, that the commissioners should jointly act, but the board was treated as a unit. The funding act is not strictly a congressional act. It is a territorial act, passed by the legislature of the Territory, and embodied in the Revised Statutes of 1887. For the purpose of assuring the validity of the act, and of placing any issuance of bonds under it beyond dispute, the act was presented to Congress for its affirmative approval, which

it gave with some few amendments, generally verbal in their nature, and evidently for the purpose of making the act more specific. The title of the act passed by Congress clearly carries out that view, for the first provision of that act is that the act of the Revised Statutes of Arizona of 1887, known as title XXXI, funding, be and is hereby amended so as to read as follows: 'And that as amended the same is hereby approved and confirmed, subject to future territorial legislation.' The act being a territorial act, and the commission being the creation of the Territory, it is directly affected by paragraph 2932, *supra* (of the Revised Statutes of Arizona)."

The foregoing decision was rendered March 28, 1900, and upholds the action of the loan commission on September 17, 1897. If the funding act was on the last date "a territorial act," and the commission was then "the creation of the Territory" and subject to the statutes of the Territory, it was just as fully a territorial act and the commission was just as fully the creation of the Territory and just as fully subject to its statutes on March 13, 1899, when the legislature passed act No. 32, entitled "An act to abolish the loan commission and to repeal sundry laws relating thereto," and specifically repealed paragraph 2039, section 1, chapter 1, title XXXI, of the Revised Statutes of the Territory of Arizona.

It seems to be a contradiction in terms to hold that the congressional act which provides that "the funding act of Arizona, as amended, is hereby approved and confirmed" means that "the funding act of Arizona, as amended, is hereby abrogated and annulled, and by implication, repealed."

The case of U. S. *v.* Tynin, 11 Wall., 88, is cited in support of the rule that when "two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the former and embraces new provisions plainly showing that it is intended as a substitute for the first act, it will operate as a repeal of that act." But we submit that this rule has no application to the facts of the present case. The act of

June 25, 1890, is plainly not a substitute for but an amendment of the funding act of Arizona. It leaves the Arizona act in full force as amended. The difference between two separate acts, the latter of which by implication may repeal the first, and two acts, the second of which is merely amendatory of the first, is obvious. "To approve" is "to sanction officially, to ratify, to establish." "To confirm" is "to make firm or firmer, to render valid by formal assent." Title XXXI, which was approved and confirmed, must, as we have suggested, have remained in force as amended, and remained in force as a territorial act just as though it had originally been passed as amended.

The Arizona statute was re-enacted by the act of Congress *verbatim et literatim*, with the few changes above noted, and it was re-enacted in quotation-marks, as if to show that it was not new legislation. Under the authorities, as fully set out under our point VII, when the Arizona statute was amended "so as to read as follows," and the paragraph creating the commission was re-enacted in terms, such part remained in force as from the time of the passage of the Arizona statute. The congressional act is merely a continuation of the Arizona one. This court so expounded the law in Bear Lake and R. Water Works and I. Co. *v.* Garland, 164 U. S., *supra*, as follows:

"Upon comparing the two acts of 1888 and 1890 together' it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there has never been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in Pacific Mail S. S. Co. *v.* Joliffe, 69 U. S., 450. In that case there was a repeal in terms of the former statute, and yet it was held that it was not the intention of the legis-

lature to thereby impair the right to fees which had arisen under the act which was repealed. As the provisions of the new act took effect simultaneously with the repeal of the old one, the court held that the new one might more properly be said to be substituted in place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating and annulling them and re-enacting the same as a new and original act."

Bearing in mind the fact that paragraph 2039 of the territorial statute is copied into the congressional act without change (except as it is made to cover such future indebtedness as might be allowed by law), we submit, as above, that this paragraph cannot be considered as repealed and re-enacted, but must be taken to have been the law all along. The congressional act is a mere continuation of the territorial act as to those sections of the territorial act which were copied without change, and is not in a proper sense a repeal.

If the act of Congress of June 25, 1890, is considered as a substitute for the territorial act, as announced in the opinion of the court herein, it repeals the territorial act only *pro tanto*, so far as there may be a repugnancy. It does not repeal paragraph 2039, because that paragraph is copied into the congressional act and is continued in force, and the loan commission, which derived its authority from the territorial act, continued, after the congressional act, to exist by virtue of the same territorial act, and was not a creation of the congressional act.

On this point, which goes to the very heart of the question, our position is that the court erred in holding that the territorial act was repealed by the congressional as to any provisions which were copied into the congressional act. The law is that repeals by implication are not favored, and the theory of repeals by implication applies only in cases where the provisions of the earlier and later statutes are inconsistent. Where any provision of the old law is carried

into the new one, such provision is not repealed and re-enacted, but is considered to have been in force from the beginning, and to remain in force under the law which originally enacted it.

Our view that there is nothing in the act of Congress indicating any change in the policy under which the whole subject of funding was left without restriction in the power of the territorial legislature is, we think, proved by the fact that the act of Congress in express terms provides that title XXXI of the Arizona statute is hereby approved and confirmed, "subject to future territorial legislation." The matter of funding was left where it was before, viz., wholly subject to territorial legislation. It is hard to see what words could have been employed which would more fully convey the idea that even after the act had been approved by Congress the Arizona legislature might legislate as it saw fit regarding it. This court said in Newhall *v.* Sanger, 92 U. S., 761, that "there is no authority to import a word into a statute to change its meaning." "Subject to future territorial legislation" cannot, according to any just rule of construction, be restricted to mean "subject to a particular kind of territorial legislation," or "subject to one act of future territorial legislation." The phrase is unrestricted, and must be taken to mean "subject to any future territorial legislation." Before the approval by Congress of title XXXI the legislature had the undoubted power to abolish the commission which it had created, and, as the title was left "subject to future territorial legislation," it had the power to do so after the congressional act as fully as before.

We think that our construction of the phrase, "subject to future territorial legislation," is fully supported by the decision of this court in Head *v.* Curators of the University of the State of Missouri, 19 Wall., 526, where the court said:

"The plaintiff was elected a professor of mathematics in the University of Missouri, and it was resolved that he should hold his office for six years from July 5, 1856, 'sub-

ject to law.' The judge at the circuit held, and we think correctly, that this expression meant subject to whatever law this State legislature might think fit to pass."

We understand this to be so held by this court in Utter *v.* Franklin, where, construing the words "subject to future territorial legislation," the opinion states that:

"In compliance with the permit thus given by Congress for future territorial legislation, the legislature of Arizona on March 18, 1891 (Laws of 1891, p. 120), enacted a new funding law."

The title of this new funding law states that it is "supplemental to the act of Congress" of June 25, 1890, which is re-enacted "subject to the modifications and additional provisions hereinafter set out." One most important modification was that "all bonds issued under the provisions of this act shall be payable in gold coin of the United States," and an additional change was made by adding the section 7, by which municipal indebtedness might be refunded without the demand of the authorities provided for by the tenth section of the congressional act.

As a matter of fact all the funding bonds have been issued under this new funding law and not under title XXXI as approved by Congress. The bonds are all payable in gold coin of the United States, as provided in this new funding law. Title XXXI provided that the interest should be payable in gold coin or its equivalent in lawful money, but stipulated that the principal shall be payable "in lawful money," and this language was unchanged when the title was approved and confirmed by Congress; but it was changed by the new funding law so that "all bonds issued under the provisions of this act and the interest thereon shall be payable in gold coin of the United States." What Congress refused to do the Arizona legislature did, and the change was a most important one in view of the history of the times regarding the financial question.

These changes and additional provisions were sanctioned by Congress because they were never disapproved, and the only theory under which such legislation is intelligible is that both Congress and the Arizona legislature regarded the matter of funding as wholly "subject to future territorial legislation."

The questions seem pertinent and material: If the Arizona legislature could modify the act in this important particular and add additional provisions, had it not as much power to add other provisions? For instance, could it not have provided that the loan commission should expire within a year? And, if it had power to limit its existence, could it not have abolished it entirely? Evidently it could have done so, unless it should be held that it did not have power to do directly what it could do indirectly; and if it had power in 1891 to modify or repeal the old funding act, title XXXI, did it not have as much power on March 13, 1899, when it passed the act to abolish the loan commission?

Congress afterwards passed the two amendatory acts of August 3, 1894, and June 6, 1896. The purpose and effect of each of these acts is unmistakable. The first one merely amended section 15 of the act of June 25, 1890, by permitting the funding of indebtedness subsequent to December 31, 1901, and for the years ending December 31, 1894, and December 31, 1895. Section 15 was no part of the original Arizona statute, title XXXI, but is the added proviso in which Congress waived the limitations of the Harrison act and permitted the funding of indebtedness incurred in excess of that act.

The act of June 6, 1896, was of the same permissive nature. It enacts "that the provisions of the acts of Congress approved June 25, 1890, and August 3, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the finding" of certain other indebtedness. The act provides

that certain evidences of indebtedness "are hereby confirmed, approved and ratified, and may be funded as in this act provided until January 1, 1897: *Provided*, That nothing in this act shall be so construed as to make the Government of the United States liable for the payment of any of said * * * evidences of indebtedness by this act approved, confirmed and made valid, and authorized to be funded."

Considering this act of June 25, 1896, in the light of the memorial of the Arizona legislature, as this court, in Utter *v.* Franklin, said may properly be done in arriving at "the intention of Congress and the exigencies the act was designed to meet," it seems not to be debatable that the only intention was to cure formal defects as to certain indebtedness.

We submit that if the funding of conceded indebtedness was always within the sole power and discretion of the Arizona legislature, the funding of validated indebtedness would also be within its sole power and authority. The acts further enlarged the class of obligations which might be funded, and did nothing more. Indebtedness which was thus validated was placed on the same footing with indebtedness which had never been questioned, and might be funded if the Arizona legislature saw fit to do so. The legislature was under no obligation to fund any indebtedness whatever. It was under no obligation to create any commission in the first instance and under no obligation to continue the one which it did create. If the indebtedness which was validated had never been questioned, there was no way by which the Territory could have been compelled to fund it. The legislature might have thought best not to fund any indebtedness whatever, and might never have created the commission, and, as we have repeatedly urged, if it came to the conclusion that the purposes of the commission had been accomplished, and it was best to discontinue it, such action

was within its sole power and could not be called in question by any one.

The foregoing construction of these acts of Congress has been announced both by the lower court and this court. In Gage *v.* McCord, 51 Pacific, 977, the supreme court of Arizona considered the effect of these statutes, and gave so full and clear an exposition of them that we reproduce it as follows:

"The acts of June 25, 1890, and August 3, 1894, being referred to, we must therefore consider the act of June 6, 1896, *in pari materia* with the former. The former act confirmed and approved, with amendments, chapter 1, tit. 31, Rev. St., passed by the territorial legislature March 10, 1887. These amendments had reference to the rate of interest, the time bonds issued for funding purposes should run, and as to what indebtedness might be funded; the act being amended in this particular to include county, municipal, and school indebtedness. Congress added to the legislative enactment a provision that in effect validated a class of obligations otherwise invalid, because incurred in violation of the organic law of the Territory, as found in the 'Harrison act,' and providing for the funding of all the then existing and outstanding indebtedness, and that which might thereafter be evidenced by warrants issued for the necessary and current expenses of carrying on territorial, county, municipal, and school government for the year ending December 31, 1890, and added to the foregoing the declaration that thereafter no warrants, certificates, or other evidences of indebtedness should be allowed to issue or be legal when the same is in excess of the limit prescribed by the Harrison act. The act of August 3, 1894, provided 'that an act entitled "An act approving, with amendments, the funding act of Arizona," approved June 25, 1890, and paragraph 2252 (section 15) of said act, be and the same is hereby amended by adding thereto as follows: "Provided, further, however, that the present outstanding warrants, certificates and other evidences of indebtedness issued subsequent to December 31, 1890, for the necessary and current expenses of carrying on the territorial government only, together with such warrants as may be issued for such purpose for the years ending December 31, 1894, and December 31, 1895,

may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates or other evidences of indebtedness shall be allowed to issue or to be legal where the same is in excess of the limit prescribed by the Harrison act."' It is to be noted that, in both the acts referred to, the only limitation imposed had reference to the class of obligations which were permitted to be funded and did not in any manner restrict the territorial officers in the method of their procedure previously prescribed by the territorial law, or limit the time within which the acts of funding, by the sale and disposition of bonds, might lawfully be done. Bearing in mind the remedial character of this legislation, and reading the act of June 6, 1896, in the light of the previous congressional enactments upon the same subject-matter, we construe the former act to express only what obviously appears to be the congressional intent, viz.: to extend and enlarge the class of obligations which may be funded, and not to limit the time within which the board of loan commissioners might complete the acts of funding indebtedness, which has expressly been recognized by congress as fundable."

As they were territorial officers, can it be that the Territory could not discontinue them? As the procedure was prescribed by the territorial laws, can it be that the same laws could not abolish the procedure?

In Utter *v.* Franklin, *supra*, this court, after quoting the act of June 26, 1890, said:

"Its evident purpose was to authorize the funding of all outstanding bonds of the Territory, and its municipalities, which had been authorized by legislative enactments, whether lawful or not, provided such bonds had been 'sold or exchanged in good faith and in compliance with the terms of the act of the legislature by which they were authorized.' The second section deals with the original bonds which had not been theretofore funded, and provides that all such as had been theretofore issued under the authority of the legislature, and which by the first section were authorized to be funded, should be confirmed, approved and validated, and might be funded until January 1, 1897."

After the passage of the act of August 3, 1894, the Arizona legislature passed act No. 33, page 45 of the Laws of 1895 (set out in the appendix). This act re-enacted the congressional act of 1894 and authorized the loan commissioners to fund the indebtedness which Congress had permitted by its act. It seems explainable only on the theory that the congressional act was a permission and not a command; that it was "subject to future territorial legislation," and that the assent of the Territory was necessary before the additional indebtedness could be funded.

It may be suggested that there is a difference in one respect between the act of August 3, 1894, and the one of June 25, 1896. As to the former, it would seem that action by the Arizona legislature was necessary before the funding of the indebtedness became the duty of the loan commission. As to the second act, it may be thought that the duty was imposed upon the commissioners directly by the act itself, without any further sanction by the legislature. The legislature having presented the memorial asking for the validation of certain evidences of indebtedness, its assent might be presumed to such validation, and it might be superfluous to re-enact that the commissioners should have power to do what the legislature had requested. This difference, however, if there is such a difference, in nowise changes the general policy of Congress leaving the subject of funding within the power of the legislature, or impairs the power of the legislature to repeal the commission. If by virtue of the act of June 25, 1896, it became the duty of the commissioners to fund certain bonds, the duty as to these bonds was no higher or greater than the duties as to the indebtedness which existed at the time of the creation of the commission by paragraph 2039, title XXXI, of the Revised Statutes of Arizona of 1887, which provides that the commissioners "shall have and exercise the powers and perform the duties hereinafter provided." The fact that additional duties are

imposed upon an officer does not prevent the office from being abolished. Validated indebtedness was merely put on the same footing as other indebtedness. As long as the commission existed the commissioners had certain duties, but when the commission was abolished all the duties ceased to exist.

It was suggested on behalf of petitioners in the lower court that the repeal by the Arizona legislature of the paragraph creating the loan commission, and of its other acts, could have no effect on the proceedings in this cause, because, *first*, the holders of the bonds are entitled to have them funded under the act of Congress of June 6, 1896, irrespective of any territorial legislation and by its own force and effect; and, *second*, because the holders of the bonds have a right to have them funded under the act of the Territory of March 19, 1891, and it was further urged that the repealing act of 1899 is of no effect as to these bonds, because section 2934 of the Revised Statutes of Arizona of 1887 provides as follows:

"2934. (SEC. 7.) The repeal or abrogation of any statute, law or rule, does not revive any former statute, law or rule thereto repealed or abrogated, nor does it affect any right then existing or accrued at the time of such repeal, or any action or proceeding theretofore taken, except such as may be provided in such subsequent repealing statutes, nor shall it affect any private statute not expressly repealed thereby."

The cases cited under our point X furnish, as we conceive, a complete answer to the first and second of these objections, and the Arizona statute itself answers the third. The bondholders have no "right" to have their bonds funded, under either the act of the legislature or of Congress. The offer to creditors to issue new bonds for outstanding ones is merely a privilege, which may be withdrawn at any time. This court so ruled in Durkee *v.* Board of Liquidation, 103 U. S., 646, *supra*. The syllabus is as follows:

"An offer on the part of the State to issue new bonds for all its valid bonds outstanding, whenever the holders chose to accept the terms on which the exchange was to be made, created no contract with the holders of the bonds that this should be done, even if they were valid, and the offer may be withdrawn."

The language of Mr. Justice Miller, in delivering the opinion of the court, is so clear, and the decision is so analogous to the present case, that we quote as follows:

"The board of liquidation is a mere agent of the government to enable it to carry into effect a plan of consolidating all its outstanding debts and converting it, with the consent of its creditors, into a uniform bond, with the same rate of interest, and providing additional security for its payment. The law under which this liquidating process was to take place and which created this Board of Liquidation, the present defendant, was passed in 1874, some time after all these bonds were issued. It did not, therefore, enter into the contract on which the bonds were issued. It was an offer on the part of the State to issue new bonds for all her valid bonds outstanding, whenever the holders chose to accept the terms on which the exchange was to be made.

"In 1876 the legislature of the State passed an act declaring the bonds now in question void and forbidding the board to receive them as valid in the scheme of liquidation. The legislature undoubtedly had the right to forbid its own agent to receive these bonds. This law may not have affected the validity of the bonds. It certainly could not make them void if they were valid before. But it could prevent the board from exchanging them for other bonds. There was no contract with the holders of these bonds that this should be done, even if they were valid. To make such a contract, there is needed the acceptance of the proposition of the State by the holder and a good consideration. Neither of these existed in this case, when the legislature simply withdrew its proposition as to these bonds."

It seems to us that the principles of law as above announced apply with full force to the present contention. The loan commission is the mere agent of the Arizona legis-

lature to carry out the will of the legislature as to financial matters. These bonds in question were issued in 1883, long before any funding act of any sort was passed. The funding act did not therefore enter into the contract on which these bonds were issued. Using the language of the opinion just cited, "the legislature undoubtedly had the right to forbid its own agent to receive these bonds," because there was no contract with the holders of the bonds that they should be funded. There is no consideration of any sort passing from the bondholders for which they can claim that a contract existed, and the legislature has abolished the loan commission, just as the Louisiana legislature withdrew its proposition.

"A provision of a State to meet its debts or engagements may be regarded as only a means of executing its own policy or transacting its own business, and may be altered or repealed at pleasure. In other words, such an arrangement is not a contract but a mere legislative regulation."

San Francisco *v.* Beidemann, 17 Cal., 443.

"The legislature possesses the entire control and management of the financial affairs of a State or a municipal corporation."

Sangamon Co. *v.* City of Springfield, 63 Ill., 66.
People *v.* Power, 25 Ill., 191.
McCauley *v.* Brooks, 16 Cal., 334.

In Tennessee *v.* Sneed, 96 U. S., 69, this court held that:

"A statute taking away the right to compel a tax collector, by mandamus, to receive notes does not impair the contract with the holder where an effectual remedy was left to him in an ordinary proceeding at law."

The court said further that:

"The rule seems to be that in modes of proceeding and of forms to enforce the contract the legislature has the control, and may enlarge, alter or limit them, provided that it

does not deny a remedy, or so embarrass it with conditions or restrictions as seriously to impair the value of that right."

While the loan commissioners had certain duties imposed on them as long as the funding act remained in force, the act itself was a mere offer or privilege which might be withdrawn. It was a remedy conferred, and it is elementary that there is no vested right in a remedy (Springfield *v.* Commissioners of Hampden, 6 Pick., 500). In the present case, although the privilege of funding the bonds has been taken away, the simple and effectual remedy of a suit in the courts of ordinary jurisdiction remains, and the bondholders are in just as favorable a position as though the bonds had been originally valid in 1883, before the funding commission was created.

The petitioners cited paragraph 2934 of the Arizona statutes above quoted, and from it argued that their "right to have funding bonds issued" could not be taken away, and further argued that the Utter case was "an action or proceeding theretofore taken."

But it is submitted that such argument is erroneous in assuming that the creation of the loan commission gave creditors any right that could not be divested by a repeal of the commission. Before the passage of the act of March 10, 1887, of course creditors had no "right" to exchange their evidences of indebtedness for the bonds authorized by such act to be issued. The legislature passed the funding law and permitted this to be done. If, before the evidences of indebtedness were funded, the law was repealed, the holders of such evidences of indebtedness were in as good a position as they were before the law was passed. No rights had been taken away from them and no contract was impaired, because no consideration had moved from either party to the other and the privilege of funding the indebtedness had never been carried into effect.

This is the rule announced in Tulley *v.* Trainor *et al.*, 53

Cal., 274, where the court construed the following California statute, which, as will be seen, is exactly like the Arizona act:

"No rights acquired or proceedings taken under the provisions repealed shall be impaired or in any manner affected by this repeal."

The court held that the "proceeding" referred to was "a proceeding whereby *some right had been acquired* and which could not be disregarded without affecting the right itself."

The court further said:

"The expression 'proceedings taken' is not the equivalent of 'suit commenced,' for if plaintiff had not a *vested right* to damages according to a certain standard before the action was brought, the mere commencement of the action did not create a new and vested right."

This language and reasoning seem controlling in the present case. If the petitioners had no vested right to fund the bonds, their demand on the loan commissioners did not create a new and vested right. Such demand was not a "proceeding theretofore taken," in the meaning of the statute, and the repeal of the loan commission did not affect any "right then existing or accrued," or any "proceeding theretofore taken."

As this case seems directly in point as to the proper construction of our statute, paragraph 2934, we cite it with confidence. It looks to us that under all the authorities it is impossible to hold that the funding was any "right" existing or accrued at the time of the repeal, nor can it be held that the demand on the defendant herein was any "proceeding taken." It was merely a proceeding begun or initiated and therefore inchoate.

Where the act of a legislature is spontaneous, and no service or duty or other remunerative condition was imposed on the beneficiary, it belongs to the class of laws de-

nominated *privilegia favorabilia*, and it is the nature of such a privilege that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign.

Christ Church *v.* Phila. County, 24 How., 300.

This case was cited and approved in Newton *v.* Com'rs, *supra*, where the court said, referring to what was claimed as a contract for a vested right:

"It must not be a mere gratuity. There must be a sufficient consideration, or no matter how long the alleged right has been enjoyed, it may be resumed by the State at its pleasure."

As to this section 2934, it is respectfully suggested that between its provisions and the present state of facts there is a distinction which must adhere in the very nature of the case. Where rights have accrued they may survive, notwithstanding a repeal of the law, provided the tribunal before which the action was pending itself survives, but no action can survive and no alleged right be enforced where the tribunal itself is destroyed by the repealing law, and no jurisdiction is conferred on any other tribunal. In the latter case there is no one to act, and that is the present state of facts, because there are no loan commissioners in existence.

This repeal contained no saving clause, and the effect of it is to divest and destroy all inchoate interests which have arisen under it. "If a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law."

Gurley *v.* Patrick Co., 137 U. S., 141.

"The repeal of an act which authorizes a course of proceeding by a public officer invalidates the proceedings at whatever state they have arrived."

Williams *v.* Lincoln Co., 35 Me., 345.
Tivey *v.* People, 8 Mich., 128.
Lamb *v.* Schottler, 54 Cal., 319.

In *In re* Hall, petitioner, 167 U. S., 38, and cases therein cited, this court held that "the effect of the repealing act was to take away the jurisdiction of the Court of Claims to proceed further in any case founded upon the repealed act."

A suit pending to enforce a right or remedy conferred solely by statute is abated by the unconditional repeal of such statute before judgment rendered in such suit.

Yeaton *v.* U. S., 9 U. S., —; 5 Cranch, 281.
Norris *v.* Crooker, 54 U. S., —; 13 How., 429.

The correct rule of interpretation is that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule that all acts *in pari materia* are to be taken together as if they were one law.

U. S. *v.* Freeman, 3 How., 556.

Under this rule the act of June 6, 1896, is to be taken as though it were part of the act of June 25, 1890, of which it is an amendment, and is therefore "subject to future territorial legislation."

"No doubt a statute which is amended is thereafter, as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly become a part of the original statute that it must be construed in view of the original statute as it stands after the amendment is introduced and the matter superseded by the amendment eliminated."

Endlich on Interpretation of Statutes, sec. 204.

Under this rule the amendments enlarging the class of obligations which might be funded are to be considered as part of the original statute title XXXI, providing for funding, which statute was under the control of the Arizona legislature.

In order that one statute may have the effect of repealing another by implication, its conflict with the former act must be "so positive as to be irreconcilable by any fair, strict, or

liberal construction of it which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject."

Endlich, Interp. St., § 210.

The fair construction which we have suggested of the act of June 6, 1896, is that it validates certain indebtedness and permits it to be funded, and preserves at the same time the force of the Arizona statute creating the loan commission, and thus both can be construed together in harmony with the whole course of legislation upon the subject, which is that the legislatures have full power as to funding, and that Congress has merely added to its powers by permitting it to fund certain indebtedness which could not have been funded without such permission.

A case which seems quite analogous as to the legal principles involved is that of Board of Commissioners *v.* Ætna Life Insurance Company, 90 Fed., 222, 227. In that case the legislature of Kansas passed a special law in 1893, entitled "An act authorizing Seward county, Kansas, to refund its outstanding indebtedness existing on May 1, 1891, and still unpaid," providing that:

"The board of county commissioners of Seward county, Kansas, is hereby authorized and empowered to refund any and all outstanding indebtedness existing on May 1, 1891, and still unpaid, by issuing bonds to the holders of such outstanding indebtedness."

The court said:

"This act contains six sections, and prescribes the method in which the bonds shall be issued and paid, and is in itself complete, independent and effective. The purpose and effect of this enactment are plain, and the terms used to accomplish them are free from all ambiguity. They were to enable Seward county 'to refund any and all outstanding

indebtedness existing on May 1, 1891,' notwithstanding the limitation of the general law. What the legislature of 1891 could prohibit, the legislature of 1893 could permit, either in whole or in part. The effect of chapter 114 of the Laws of 1893 was to except Seward county from the terms of the limitation of the act of 1891. It did not repeal the general law, nor deprive the county of Seward of any of the powers and privileges granted to it in common with every other county in the State by that law; but it had the effect to confer upon Seward county the additional privilege of refunding all the debts it owed on May 1, 1891, although its bonded indebtedness already exceeded the limitation prescribed by the act of 1891. This conclusion is in accord with the settled rules of construction that, when there are two acts upon the same subject, they must stand together, if possible; that, if the two are repugnant in any of their provisions, the later act operates as a repeal of the former act so far, and only so far, as its provisions are repugnant to those of the earlier act (*In re* Henderson's Tobacco, 11 Wall., 652–657); that privileges granted by special act are not affected by inconsistent general legislation on the same subject, but the special act and the general laws must stand together, the one as the law of the particular case, and the other as the general law of the land (Gowen *v.* Harley, 6 C. C. A., 190–196; 56 Fed., 973–979, and 12 U. S. App., 574–584); and that 'all statutes *in pari materia* are to be read and construed together, as if they formed part of the same statute, and were enacted at the same time'" (Potter Dwar. Stat., 145).

In applying these principles to the present case we submit that the various acts of Congress waiving the limitations of the Harrison act and permitting additional indebtedness to be funded did not repeal the general law passed by the Arizona legislature, title XXXI, nor did the added privilege deprive the Territory of any of its powers as to the subject of funding. What Congress had prohibited by the Harrison act it could waive by the subsequent legislation, and that this is all that it intended to do and did do. The legislative will is to be ascertained not from the literal meaning of the words of the statute alone, but from the text as a whole, in-

terpreted in view of the general object and purpose of the act.

By act 74 of the Eighteenth Legislative Assembly (1895), the legislature gave the loan commissioners additional powers and duties and further legislated as to the commission in act No. 78 of 1897, all of which changes were acquiesced in by Congress, so that the practical construction which has been given to the provision for "future territorial legislation" would appear to be that the duration of the funding commission and the duties of the commissioners were under the unrestricted control of the Arizona legislature.

REPEAL OF THE COMMISSION.

Act No. 32 of the Twentieth Legislative Assembly of Arizona is as follows:

"An act to abolish the loan commission and to repeal sundry laws relating thereto.

"*Be it enacted by the Legislative Assembly of the Territory of Arizona:*

"SECTION 1. That paragraph 2039, section 1, chapter 1, title XXXI, of the Revised Statutes of the Territory of Arizona; also, that section 1 of act No. 79, Session Laws of the Sixteenth Legislative Assembly of the Territory of Arizona, also act No. 33 and act No. 74, Session Laws of the Eighteenth Legislative Assembly of the Territory of Arizona are hereby repealed.

"SEC. 2. This act shall take effect and be in force from and after its passage.

"This bill having been returned by the governor, with his objections thereto, and, after reconsideration, having passed both houses by a two-thirds vote of each house, has become a law this 13th day of March, A. D. 1899."

Paragraph 2039 is the one creating the loan commission, as follows:

"2039. (SEC. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing in-

debtedness of the Territory of Arizona, the governor of the said Territory, together with the territorial auditor and territorial secretary and their successors in office, shall constitute a board of commissioners to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided."

Section 1 of act No. 79 of the Sixteenth Legislative Assembly is as follows:

"An act to provide for funding territorial, county and other indebtedness and being supplemental to the act of Congress entitled 'An act approving with amendments the funding act of Arizona, approved June 25, 1890.'

"*Be it enacted by the Legislative Assembly of the Territory of Arizona:*

"SECTION 1. That the act of Congress entitled 'An act approving with amendments the funding act of Arizona,' approved June 25, 1890, be and the same is hereby re-enacted as of the date of its approval, subject to the modifications and additional provisions hereinafter set out, and to carry out the purpose and intention of said act of Congress, the loan commissioners of the Territory of Arizona shall provide for the liquidation, funding and payment of the indebtedness existing and outstanding on the 31st day of December, 1890, of the Territory, the counties, municipalities and school districts within said Territory by the issuance of bonds of said Territory, as authorized by said act, and all bonds issued under the provisions of this act and the interest thereon shall be payable in gold coin of the United States."

Act No. 33 of the Session Laws of the Eighteenth Legislative Assembly is entitled "An act to provide for funding territorial indebtedness only incurred since December 31, 1890, in accordance with an act of Congress entitled 'An act approving with amendments the funding act of Arizona, approved June 25, 1890,' and approved August 3, 1894."

Act No. 74 of the Eighteenth Legislative Assembly is en-

titled "An act to remedy defects in the records of the loan commission of the Territory of Arizona."

According to the views which we have submitted herein, the loan commission was the creation of the Territory of Arizona. Paragraph 2039 established the commission, and the other paragraphs of title XXXI defined its powers and duties. Paragraph 2039, we have submitted, was not repealed by the act of June 25, 1890, which re-enacted it, nor was it repealed by any other act till act No. 32. When that act was passed the commission was abolished, because it was only by virtue of paragraph 2039 that there are any commissioners. That paragraph is the basis of every act relating to funding. A territorial legislature may declare vacant an office which it has created even during the term of the incumbent (People *v.* Van Gaskin, 5 Mont., 352). Most clearly it can abolish an office where no term is fixed.

The act of the Arizona legislature repealing the loan commission was brought to the special attention of Congress and was not disapproved. On the contrary, the construction was given to it for which we have contended. The following report shows the views expressed and action taken by Congress regarding this matter:

56TH CONGRESS, 1*st Session.* } HOUSE OF REPRESENTATIVES. { *Report No.* 1473.

Issue of Bonds by Supervisors, Pima County, Ariz.

May 14, 1900.—Referred to the House calendar and ordered to be printed.

Mr. Finley, from the Committee on the Territories, submitted the following:

Report.

(To accompany H. R. 8068.)

The Committee on the Territories, to whom was referred the bill (H. R. 8068) authorizing the board of supervisors of Pima county, Ariz., to issue fifty-year 5 per cent. bonds of

Pima county, Ariz., to redeem certain funded indebtedness of said county, beg leave to submit the following report and recommend that said bill do pass:

The first act bearing on this subject is the act of the territorial legislature approved March 10, 1887, providing for outstanding indebtedness.

It provided for a loan commission to perform the duties prescribed by the act in the funding of indebtedness, the commission to be composed of the governor, territorial auditor, and territorial secretary.

For existing indebtedness due and to become due, the commission was empowered to issue negotiable coupon bonds of $1,000 each, with interest to be fixed by the commission.

This act, of course, provides for the whole procedure in the issuance of these bonds, providing for their final payment within twenty-five years as the commissioners might fix (Revised Statutes of Arizona, p. 361).

Under this act, in 1887, Pima county issued $300,000 worth of 7 per cent. bonds, and later the loan commission funded $103,000 of them in 5 per cent. fifty-year bonds, and $147,000 of them are yet unfunded, the first installment of which, $25,000, falls due June 30, 1901, the levy for which, if this bill is not passed, will have to be made in August next.

In 1890 this act of the territorial legislature was amended by Congress (U. S. Stat. L. 26, p. 175) so as to authorize the loan commission to issue bonds bearing interest not to exceed 5 per cent., and authorized the commission, on the request of counties and municipalities, to issue territorial bonds in lieu of their indebtedness to run fifty years, and to open up an account of the same with the counties and municipalities of the Territory, assuming their original obligation.

This act so amended, and approved as amended, provided that the same as amended, and the same is hereby approved and confirmed, subject to future territorial legislation.

Now, following this, the territorial legislature, March 19, 1891, passed an act approving of this funding act of the Territory enacted by Congress, amending chapter 1 of title 31 of the Revised Statutes, before referred to, and set the matter in motion as enacted by Congress and submitted to

territorial legislation afterwards (act 79, at page 97, Session Laws of Arizona of 1891).

Following that, on June 6, 1896, Congress passed an act amending and extending the provisions of the act of Congress before named to the territorial indebtedness, providing that the acts of Congress approved June 25, 1890, and August 3, 1894, authorizing the funding of the indebtedness of Arizona, be amended so as to authorize the funding of outstanding obligations of the Territory and to counties, municipalities, etc., until January 1, 1897, providing that all outstanding bonds, warrants, and other evidences of indebtedness of the Territory, counties. etc., heretofore authorized by legislative enactment of the Territory, bearing a high rate of interest, might be refunded into bonds bearing a lower rate. This might be done up to January 1, 1897, remember. That is its limitation.

After this act the general funding act before referred to, enacted by Congress, having provided that it should all be subject to future legislation, was again passed upon by legislature in 1899, found at page 39 of the laws of that session.

There they pass an act called "An act to abolish the loan commission and to repeal sundry laws thereto." The act was that paragraph 2039, section 1, chapter 1, title 31, of the Revised Statutes of Arizona, the one heretofore referred to, and also that section 1 of act 79, Session Laws of the Sixteenth Legislative Assembly heretofore referred to, and acts 33 and 74 of the Session Laws of the Eighteenth Legislative Assembly of the Territory, referring to all of the funding acts, are hereby repealed. It repealed them all, and in that condition we are now.

Now, in view of the fact that Congress, in amending and re-enacting the funding law of Arizona, as before stated, provided that it should be subject to the future legislation of the Territory, and in view of the further fact that Congress in 1896 provided the limitation for funding the outstanding indebtedness at the date of January 1, 1897, and of the further fact that the legislature of Arizona, to whose jurisdiction Congress referred this funding business and subjected it to its power, repealed all these laws outright, we submit that the board of supervisors now have no authority under existing laws to issue bonds for the refunding of Pima county's indebtedness.

In view of the foregoing facts the passage of the bill is respectfully recommended.

DO THESE BONDS COME WITHIN THE PROVISIONS OF THE ACT OF JUNE 6, 1896?

This court said in Utter *v.* Franklin that the memorial of the Arizona legislature was proper to be considered in construing the act of Congress passed in relation thereto. That memorial specifically refers only to bonds the validity of which "for many years after the issuance was unquestioned and acknowledged by the payment of the interest thereon as it fell due."

It is clear that these Narrow Gauge bonds do not come within the intent of the memorial, because the findings of fact show (rec., pp. 98, 101, 102) that no interest was ever paid on any of the bonds. The treasurer of the railroad company testified (rec., p. 98) that he "made several applications to the treasurer of Pima county to pay the interest on these bonds, but he refused, and the railroad company never received any money from the county treasurer or from anybody else on these bonds."

The Arizona legislature, finding that an attempt was made to include the bonds in question in the provisions of the act of June 6, 1896, passed the following memorials in 1897 and 1899 (Council Memorial No. 3, 19th Legislative Assembly, Laws 1897, p. 146, and House Memorial No. 1, 20th Legislative Assembly, Laws 1899, p. 89):

COUNCIL MEMORIAL NO. 3.

To His Excellency, the President of the United States:

SIR: We, your memorialists, the Nineteenth Legislative Assembly of the Territory of Arizona, urgently request you to veto the act of Congress legalizing Arizona bonds. The Supreme Court declared them invalid and void in the case of Lewis *v.* Pima County, 155 U. S. Reports, page 54. The facts could not have been fairly presented to Congress and the result as it is. The people of Arizona look to you now

for salvation in the exercise of the veto power so wisely exercised by Your Excellency.

D. G. CHALMERS,
Speaker of the House.

FRED G. HUGHES,
President of the Council.

HOUSE MEMORIAL NO. 1.

To the Senate and House of Representatives of the United States of America, in Congress Assembled:

Your memorialists, the Legislative Assembly of the Territory of Arizona, beg leave to submit to your honorable body that,

Whereas, a memorial was presented to your honorable bodies by the Eighteenth Legislative Assembly of the Territory of Arizona regarding bonds issued by certain counties of said Territory, which memorial was intended to apply only to such bonds as had been bought in good faith, and interest on which had been paid as stated in the aforesaid memorial; and

Whereas, in response to said memorial your honorable bodies thereafter passed the act entitled "An act amending and extending the provisions of an act of Congress entitled An act approving, with amendments, the funding act of Arizona," approved June 6th, 1896; and

Whereas, based on said memorial and act of June 6, 1896, the Supreme Court of the United States has recently rendered a decision tending to recognize the validity of certain bonds issued by Pima county, Arizona Territory, to the Arizona Narrow Gauge railroad, under the provisions of the act of the Legislative Assembly of the Territory of Arizona, approved February 1, 1883, and

Whereas, before the passage of said memorial said bonds had been declared unauthorized and void by the district court of the first judicial district of the Territory of Arizona, in and for Pima county, by the supreme court of the Territory of Arizona and by the Supreme Court of the United States, in the case of Lewis *v.* The County of Pima, decided in the Supreme Court of the United States at its October, 1894, term; and

Whereas, said bonds issued to said Arizona Narrow Gauge

Railroad Company were never acquired by said county (company) in good faith, and were never sold by it in good faith or for a valuable consideration, and none of the interest on said bonds had ever been paid by Pima county, and the validity of said bonds had never been acknowledged by said county, and

Whereas, the said Arizona Narrow Gauge Railroad was never built and never existed, and Pima county has never received any consideration whatever for the said so-called bonds, and the entire scheme of the said bond issue was a fraud without any element of merit or good faith, and

Whereas, all the foregoing facts were and are notorious, and within the knowledge of every one who has ever had any dealings with said bonds, and

Whereas, it was by all the members of the legislature passing said memorial and by the governor of Arizona at the time, and by the then delegate in Congress from Arizona, believed that all of said bonds so issued by Pima county to the Arizona Narrow Gauge Railroad Company were *res adjudicata* by the said decision of the Supreme Court of the United States, and that none of the said bonds could be thereafter validated, and

Whereas, said memorial was intended to apply only to certain railway aid bonds of two other counties in Arizona, where the aided railways were actually constructed, and not to the said bonds so issued by Pima county, as to which none of the statements or reasons in said memorial applied, and which bonds were then as now believed to be without consideration, unjust, fraudulent and void.

Therefore, we most strongly urge upon the Senate and House of Representatives of the United States of America to pass such legislation as will exclude from the provisions of the act of Congress of June 6th, 1896, and from any and all other legislation by Congress the said bonds so issued by Pima county to the Arizona Narrow Gauge Railroad Company, so that neither said act of June 6th, 1896, or any other act will be construed so as to validate the said bonds issued by Pima county; and it is further,

Resolved, That our delegate to Congress be and is hereby instructed to use all proper means to bring this subject to the careful and immediate consideration of Congress, in order to secure, if possible, from Congress such legislation as is prayed for herein, and that the secretary of the Terri-

tory be and he is hereby requested to transmit a copy of the foregoing memorial to each House of Congress and to our delegate in Congress.

It is further shown by the findings of fact (rec., p. 102) that the present owners of the coupons, Coler & Co., bought them as they matured, with full notice that the first coupons had been protested, and that the bonds had been repudiated by Pima county from the start.

It was further shown (rec., pp. 102 and 103) that the firm of Coler & Co., W. N. Coler, Jr., and the North American Loan and Trust Company acquired their holdings under facts showing full notice and knowledge of the invalidity of the bonds.

The funding act of June 6, 1896, legalizes certain bonds, provided such bonds had been sold or exchanged in good faith and in compliance with the terms of the act of the legislature by which they were authorized.

Even if these bonds were exchanged in literal or technical compliance with the terms of the act, it is respectfully submitted that they were not exchanged "in good faith." The legislation under and by which these bonds were issued must rest upon the theory that the road would be a benefit to the local community (Elliott on Railroads, par. 877). It could not have been in contemplation that bonds were to be exchanged simply for ten miles of poorly laid track ending on the mesa. It was the purpose to aid in the construction of the road as per the route named in the articles of incorporation.

ROAD NOT FINISHED.

The findings of fact show (p. 98) that the incorporators of said railroad company had no way in which they could reasonably count on having this road built; that they had no funds promised or secured with which to complete the road

at the time, and no arrangement with any capitalists or any syndicate by which the money was to be furnished to complete the road; that they did not expect to put in the money themselves and had no idea where they were to get it.

The estimates attached to the original articles of incorporation show that it would take over $2,000,000 to build and equip the road, of which amount the projectors spent a little more than half of one per cent.

Taking the memorial into consideration in construing the act of June 6, 1896, it is submitted that the words "in good faith" refer to cases where the railroads had been completed, and do not include such a case as this.

Furthermore, it is shown by the eighth finding of fact (rec., p. 99) that the firm of Coler & Co. took all the assets of the road with full knowledge of the repudiation of the bonds, and through one J. Alden Gaylord, agent of Coler & Co., represented that at least 30 miles of the road would be finished during the summer of 1886. Color & Co. became stockholders in the Arizona Narrow Gauge Railroad Company on August 9, 1886. The ostensible contractor, W. W. Walker, "did not have sufficient means to build thirty miles of the said railroad, and that Coler & Co. knew this fact." The findings further show (rec., p. 100) that this firm of Coler & Co. agreed to build the first thirty miles of the railroad, but that after they got the bonds of Pima county they refused to proceed farther on the lines originally agreed upon, and no more work was done on the railroad, and Coler & Co. never even rendered an account showing the amount of money advanced by them and for what purposes.

In Wood *v.* Guaranty Trust Company, 128 U. S., 416, 423, this court found no difficulty in holding that one Starr "was essentially (that is, from a business point of view) the water works company." There can be no difficulty in holding in this case that Coler & Co. were the railroad company, to all intents and purposes. All the expenses of litigation

heretofore have been advanced by Coler & Co., and "it is further found that, except Elizabeth B. Voorhees, the other owners of these bonds have never been charged with any moneys advanced by Coler & Co. in regard to such bonds or expenses incurred by Coler & Co. in carrying on any litigation" (rec., p. 105).

It is respectfully submitted that the agreement under which this litigation is being urged is such that plaintiffs ought not to be allowed to maintain it. The findings of fact show (rec., pp. 103, 104) that Coler & Co. are to advance all expenses, and as to the owners of the bonds it is understood that they "are not to assume any expense whatever in the event of the failure of Coler & Co. to secure a settlement or enforcement of this indebtedness."

Respectfully submitted.

ROCHESTER FORD,
Of Counsel for Appellants.

APPENDIX.

No. 35.

An act to promote the construction of a certain railroad.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. Upon information in writing to the chairman of the board of supervisors of Pima county, Arizona Territory, by the president of the Arizona Narrow Gauge Railroad Company, the corporation of that name which filed its articles of association with the secretary of said Territory, on the 23d day of November, A. D. 1882, that said railroad company is ready to exchange bonds with the said county of Pima, according to the provisions of this act, it shall be the duty of said chairman, and he is hereby directed to call a meeting of said board, to be held within five days after the receipt of said notification, and it shall be the duty of said board of supervisors, and they are hereby directed to meet within five days, at the county-seat of said county, and then and there to order issued two hundred thousand dollars of bonds of said county, in denominations of one thousand dollars each, and bearing interest at the rate of seven per cent. per annum, interest payable semi-annually, the principal payable in twenty years, which said bonds and interest coupons thereto attached shall be signed by said chairman and the clerk of said board, and shall, within thirty days after the said order of issuance thereof has been made, be delivered by the clerk of said board to the county treasurer of said county of Pima, to be by him disposed of as hereinafter provided, and said county treasurer shall receipt to the said clerk for the said bonds.

SEC. 2. Upon the application of said railroad company to the said treasurer, and the tender by said company of fifty thousand dollars of the first-mortgage bonds of said company in like denominations, bearing like interest and payable in like time as those of said county, it shall be the duty

of said treasurer, and he is hereby directed to deliver fifty thousand dollars of bonds of said county to the president and secretary of said railroad company, in exchange for fifty thousand dollars of the first-mortgage bonds of said railroad company, so tendered as above provided. And whenever and so often as five each miles of said railroad shall have been graded, laid with ties and iron, said treasurer shall upon proof thereof, which proof shall be the certificate of the county surveyor to that effect, exchange with the said president and secretary of said railroad company fifty thousand dollars of said bonds of said Pima county for fifty thousand dollars of said bonds of said company, for each five miles so completed, until the two hundred thousand dollars of bonds of said Pima county are exchanged for a like number of bonds of said railroad company.

SEC. 3. The said bonds herein provided to be issued by the said county of Pima shall be issued in the name of said county, and shall be made payable to bearer twenty years after date, and shall be made payable, both principal and interest, at the office of the county treasurer of said county issuing the same. The said bonds and coupons, in addition to being signed by the chairman and clerk of the board of supervisors of said county, shall be also signed by the recorder of said county, who shall affix to each bond the seal of his office.

SEC. 4. The said board of supervisors of Pima county, issuing bonds as aforesaid, are hereby authorized and directed, at their first regular meeting, after the issuance of the same, and in each year thereafter, until the said bonds are paid, in case there should not be sufficient moneys in the railroad fund, hereafter provided for, to pay the annual interest upon said bonds, to levy for each year a tax sufficient to meet any deficiency in said railroad fund to pay said interest, which tax, however, shall not be more than twenty cents upon each one hundred dollars of taxable property in the above-named county, which tax shall be levied and collected in the manner as is, or may hereafter be provided by law for the levying and collecting of other territorial and county taxes in said county, and which tax shall be known as the railroad deficiency interest tax, and the proceeds of said tax, together with the interest received by said county on the bonds of said railroad company, held by said county, shall constitute a fund to be applied only to the payment of

the interest on and redemption of the bonds provided for in this act to be issued by said county, and shall constitute the fund heretofore mentioned and be known as the railroad fund.

SEC. 5. The bonds of said railroad company hereinbefore provided for to be tendered and exchanged for the bonds of Pima county shall be secured by a deed of trust or mortgage to at least two trustees, of all the property, real and personal, owned by said railroad company, at the time of the issuance of said bonds, or that may thereafter be acquired, including, also, all franchises and privileges of whatsoever kind or nature, and which said deed of trust or mortgage shall be the first made of or on said property, and said bonds of said company shall be issued in the name of said company, and shall be made payable to bearer twenty years after date, and shall have interest coupons thereunto attached, and shall be made payable, both principal and interest, at the office of said company in the city of Tucson, in the county of Pima. And said deed of trust or mortgage shall provide that no more bonds than the amount of thirteen thousand dollars per mile, to be secured by said deed of trust or mortgage, shall be issued by said railroad company.

SEC. 6. Whenever, in the judgment of the board of supervisors of Pima county, it may be deemed advisable to sell any or all of the bonds of said railroad company, received in exchange by them, as aforesaid, they are hereby authorized and empowered to direct the treasurer of said county to advertise in a newspaper published in said county for the space of four weeks, for sealed proposals for the purchase of any or all of said bonds of said railroad company; and ten days after the said notice shall have been published as aforesaid, the treasurer shall open the said proposals, and shall sell said bonds to the highest bidder therefor, in such lots as he may be directed by said board of supervisors, and the proceeds of such sale shall be placed in the said railroad fund to pay the interest and principal on the respective bonds of said county; *provided, however*, that the treasurer may reject any and all bids; *and, provided, further*, that no sale of such bonds shall be concluded until confirmed and approved by the board of supervisors by an order entered upon its minutes.

SEC. 7. Whenever, after the payment out of said railroad

fund of the semi-annual interest on the said bonds, there shall be any money left in said railroad fund, it shall be the duty of the treasurer of said county to advertise in a newspaper published in said county, for the space of four weeks, for sealed proposals to surrender any of the bonds of the said county, and ten days after such notice shall have been published as aforesaid, the treasurer shall open the said proposals, and shall redeem the bonds of said county, so far as the said fund on hand may be sufficient; *provided*, those offered to be surrendered at the lowest rates, shall be redeemed first; *and, provided, further*, that none shall be redeemed at a price exceeding the par value of said bonds.

SEC. 8. If, for any reason, the board of supervisors of the county herein named fails to meet at the times herein designated it shall be the duty of said board to meet on each succeeding Monday thereafter until the acts provided to be done by said board, under the provisions of this act, have been fully done and completed, and all the acts of said board so done in the premises, subsequent to the times hereinbefore designated, shall be as valid as though done within the time hereinbefore prescribed.

SEC. 9. A copy of the articles of association, certified by the secretary of the Territory of Arizona, of the Arizona Narrow Gauge Railroad Company, and endorsed as filed by said secretary on the 23d day of November, A. D. 1882, shall be sufficient proof to the board of supervisors of Pima county or officers herein named of the identification of said Arizona Narrow Gauge Railroad Company herein mentioned. The route of said road shall in all respects, so far as practicable, conform substantially to the route set forth in the articles of incorporation of said company now on file in the office of the secretary of this Territory.

SEC. 10. This act shall take effect and be in force from and after its passage.

Approved February 21st, 1883.

No. 56.

An act supplemental to an act entitled "An act to promote the construction of a certain railroad," approved February 21st, 1883.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. The incorporators of the said railroad company known in said act as the Arizona Narrow Gauge Railroad Company, are hereby authorized and empowered to construct said road either as a narrow-gauge or standard-gauge railroad, as to them shall seem advisable and expedient, and the provisions of said act, approved February 21st, A. D. 1883, to promote the construction of a certain railroad, are extended in every particular to the said company.

SEC. 2. The said company upon exhibiting to the board of supervisors of Pima county, Arizona, or officers named in said act referred to, a certified copy of their articles of incorporation filed in the office of the territorial secretary, providing for the construction of a standard or narrow gauge railroad, shall be entitled to all the benefits conferred upon them by the provisions of said act.

SEC. 3. This act shall take effect and be in force from and after its passage.

Approved March 6th, 1883.

TITLE XXXI.

Funding.

CHAPTER ONE.

Territorial Indebtedness.

(Approved March 10th, 1887.)

2039. (SEC. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona, the governor of the said Territory, together with the territorial auditor and territorial secretary and their successors in office, shall con-

stitute a board of commissioners to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

2040. (SEC. 2.) It shall be, and is hereby declared the duty of the loan commissioners to provide for the payment of the existing territorial indebtedness due and to become due, and for the purpose of paying, redeeming and refunding all or any part of the principal and interest, or either, of the existing and subsisting territorial legal indebtedness, and also that which may, at any time, become due, the said commissioners shall from time to time, issue negotiable coupon bonds of this Territory, when the same can be done at a lower rate of interest and to the profit and benefit of the Territory.

2041. (SEC. 3.) Said bonds shall be issued as near as practicable in denominations of one thousand dollars, but bonds of a lower denomination, not less than two hundred and fifty dollars, may be issued when necessary. Said bonds shall bear interest at a rate to be fixed by said loan commissioners, but in no case to exceed six and one-half ($6\frac{1}{2}$) per cent. per annum, which interest shall be paid in gold coin or its equivalent in lawful money of the United States, on the 15th day of January in each year at the office of the territorial treasurer, or at such bank in the city of New York in the State of New York, or in the city of San Francisco, in the State of California, as may be designated by said loan commissioners, at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States, within twenty-five years after the date of their issue. They shall bear the date of their issue, state when, where, and to whom payable, rate of interest and when and where payable, and shall be signed by said loan commissioners, and shall have the seal of the Territory affixed thereto, and countersigned by the territorial treasurer and bear his official seal, and shall be registered by the territorial auditor in a book to be kept by him for that purpose, and the faith and credit of the Territory is hereby pledged for the payment of said bonds, and the interest accruing thereon, as herein provided.

2042. (SEC. 4.) Coupons for the interest shall be attached to each bond so that they may be removed without injury

or mutilation to the bond. They shall be consecutively numbered and bear the same number of the bond to which they are attached, and shall be signed by the territorial treasurer. The said coupons shall cover the interest expressed in said bonds from the date of issue until paid; but in no case shall said bonds bear interest, nor shall any interest be paid thereon for any time before their delivery to the purchaser as hereinafter provided.

2043. (SEC. 5.) Whenever the said loan commissioners shall have decided to refund or redeem all or any part of the existing indebtedness of this Territory, they shall direct the territorial treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published for the period of one month in some daily newspaper published at the capital of the Territory, and, at least, one insertion in a newspaper published in the city of New York in the State of New York, and in the city of San Francisco, in the State of California, such notice shall specify the amount of bonds to be sold, the rate of interest they shall bear, the place, day and hour of sale and that bids will be received by said treasurer for the purchase of said bonds, within one month from the expiration of such publication; and at the place and time named in said notice, the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof, to the highest bidder or bidders therefor; *provided*, that said loan commissioners shall have the right to reject any and all bids; *and provided, further*, that they may refuse to make any award unless sufficient security shall be furnished by the bidder or bidders for the compliance with the terms of their bids.

2044. (SEC. 6.) When a sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds as in this act provided, and any expense incurred by them therefor, for the publication of said notices, costs of remitting funds for the payment of interest or money on said bonds, and all other necessary incidental expenses under the provisions of this act, shall be paid out of the general fund of said Territory, upon the order of the territorial auditor, and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund. They shall, from time to time, after signing said bonds, deliver them to the territorial treasurer taking his

receipt therefor, and charge him therewith. The said treasurer shall give to the Territory of Arizona an additional official bond with two or more sureties in a sum equal to the amount of bonds issued under this act, delivered to him by the said loan commissioners, which bond shall be approved by the governor and deposited and filed with the secretary of the Territory and recorded by him in a book to be kept for that purpose. And the said treasurer shall stand charged upon his official bond for the faithful performance of the duties required of him under this act.

2045. (SEC. 7.) The territorial treasurer shall sell said bonds for cash, or exchange them for any of the territorial indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any territorial indebtedness be redeemed at more than its face value and any interest that may be due thereon. The said treasurer shall indorse, by writing or stamping in ink on the face of the paper, evidencing the indebtedness received by him in exchange for said bonds, the time when and the amount for which exchanged.

2046. (SEC. 8.) All moneys so received by said treasurer, from a sale of such bonds, shall be applied by him exclusively to the redemption of the territorial indebtedness for the redemption of which such bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of territorial warrants, of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease.

2047. (SEC. 9.) There shall be levied annually upon the taxable property of this Territory, and in addition to the levy for other authorized taxes, a sufficient sum to pay the interest on all bonds issued and disposed of in pursuance of the provisions of this act, to be placed by the territorial treasurer in a fund to be known as the "interest fund." And ten years after such bonds shall have been issued such additional amounts shall be levied annually as will pay ten per cent. of the total amount issued until all the bonds issued under the provisions of this act are paid and discharged.

The territorial board of equalization, if there be one, if not then the territorial auditor, shall determine the rate of

tax to be levied in the different counties in the Territory to carry out the provisions of this act, and shall certify the same to the board of supervisors in each county and the said board of supervisors are hereby directed and required to enter such rate on the assessment-roll of their respective counties in the same manner and with the same effect as is provided by law in relation to other territorial and county taxes. Every tax levied under the provisions or authority of this act is hereby made a lien against the property assessed, which lien shall attach on the first Monday in March in each year, and shall not be satisfied or removed until such tax has been paid. All moneys derived from taxes authorized by the provisions of this act shall be paid into the territorial treasury, and shall be applied:

First. To the payment of the interest on the bonds issued hereunder.

Second. To the payment of the principal of such bonds.

Provided, That all moneys remaining in the "interest fund" after the payment of the interest in each year, for the first ten years after the issuance of any bonds under this act, and all moneys remaining in the "redemption fund" after all of said bonds shall have been paid and discharged, shall be transferred by the territorial treasurer to the territorial general fund.

2048. (SEC. 10.) Whenever after the expiration of the ten years from the date of issuance of any bonds under this act, there remains, after the payment of interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the duty of the territorial treasurer to advertise, as in manner of the advertising by the loan commissioners for bids, for sale of bonds, which advertisement shall state the amount of money in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which such fund is set apart to pay and discharge, and if such bonds, so numbered in such advertisements, shall not be presented for payment and cancellation, at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the territorial auditor, who shall endorse, on each bond, the amount due

thereon, and shall write across the face of each bond, the date of its surrender, and the name of the person surrendering. The territorial auditor shall keep a record of all bonds issued and disposed of by the territorial treasurer, showing their number, rate of interest, date and amount of sale, when, where and to whom payable, and if exchanged, for what, and when presented for redemption, the date, amount due thereon and person surrendering.

2049. (SEC. 11.) When the treasurer pays or redeems any territorial indebtedness, he shall endorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness, so paid or redeemed, the words "redeemed and cancelled," with the date of cancellation. He shall keep a full and particular account and record of all his proceedings under this act, and of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings under this act with his annual report, to be, by the governor, laid before the legislature at its meeting. All books and papers pertaining to the matter provided in this act, shall, at all times, be open to the inspection of the party interested or the governor, or a committee of either branch of the legislature, or a joint committee of both.

2050. (SEC. 12.) It shall be the duty of the territorial treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient, and if said fund be not sufficient then to pay the deficiency out of the general fund; *provided*, that the territorial auditor shall first draw his warrant on the territorial treasurer, payable to the order of said treasurer, for the amount of such deficiency out of the general fund, which said interest warrant shall be drawn at least one month previous to the maturing of the interest.

2051. (SEC. 13.) It shall be the duty of said board of loan commissioners to make a full report of all their proceedings had under the provisions of this act to the governor on or before the first day of January of each year, and said reports shall be transmitted by the governor to the Territorial Legislative Assembly.

2052. (SEC. 14.) No bond issued under the provisions of this act shall be taxed within this Territory.

(Took effect immediately.)

No. 79.

An act to provide for funding territorial, county and other indebtedness and being supplemental to the act of Congress entitled "An act approving with amendments the funding act of Arizona," approved June 25, 1890.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. That the act of Congress entitled "An act approving with amendments the funding act of Arizona," approved June 25th, 1890, be and the same is hereby now re-enacted as of the date of its approval, subject to the modifications and additional provisions hereinafter set out, and to carry out the purpose and intention of said act of Congress, the loan commissioners of the Territory of Arizona shall provide for the liquidation, funding and payment of the indebtedness existing and outstanding on the 31st day of December, 1890, of the Territory, the counties, municipalities and school districts within said Territory, by the issuance of bonds of said Territory, as authorized by said act, and all bonds issued under the provisions of this act and the interest thereon shall be payable in gold coin of the United States.

SEC. 2. Whenever the said loan commissioners shall redeem, refund or pay any indebtedness of a county, municipality or school district, or issue bonds to such county, municipality or school district as authorized by said act of Congress, the territorial treasurer shall open and keep an account with said county, municipality or school district, and shall at once make out and transmit to the proper officer or officers charged with the administration of the affairs of said county, municipality or school district, a statement under his official seal, showing the amount and character of the indebtedness of said county, municipality or school district, refunded or paid, the amount of bonds issued therefor, when due and payable, rate of interest and amount of interest that will be required to be paid annually thereon. And said officer or officers shall file said statement in the proper office as a record therein.

SEC. 3. In all cases of funding and paying the indebtedness of any county or school district in such county, the board of supervisors of such county, or, of funding and paying

the indebtedness of any municipality, the executive or other proper officer or officers of such municipality, shall annually, at the time of assessing and levying taxes therein, cause to be assessed and levied each year upon the taxable property of the county in case of county indebtedness, municipality in case of municipal indebtedness, and school district in case of school-district indebtedness, and in addition to other authorized taxes, a sufficient sum to pay the interest on the bonds issued and disposed of under the provisions of this act, for the benefit of such county, municipality or school district respectively. And fifty (50) years after such bonds shall have been issued, such additional amount shall be levied, annually, as will pay ten per cent. of the total amount issued until all the bonds issued under the provisions of this act are paid. And all taxes shall be assessed, levied and collected as other county, municipal and school-district taxes are collected, and shall be paid into the territorial treasury.

SEC. 4. If sufficient money shall not be realized each year from the collection of taxes to pay the interest on said bonds when due, the deficiency shall be paid out of the money, fund or funds, used for defraying the general expenses of such county, municipality or school district, for funding, redemption and payment of whose indebtedness said bonds were issued, which said deficiency shall be paid by the proper officer or officers in charge of said money, fund or funds, upon the official demand thereof by the territorial treasurer. All money collected in any county, municipality or school district, for the payment of said interest remaining after such payment, shall be paid into said fund or funds used for the general expenses of such county, municipality or school district.

SEC. 5. It shall be the duty of the respective county, municipal and school district officers, whose duty it is to levy and collect the taxes therein, to levy and collect the tax in this act provided for the payment of the principal and interest of said bonds when due and payable and to pay the same into the territorial treasury at the time and times of the payment of the territorial taxes. Any failure to comply with the conditions and provisions of this act by any officer or officers charged with the performance thereof, or any neglect or refusal by him or them to levy, collect or pay over such taxes as aforesaid, or to apply the money collected

under this act otherwise than for the purpose for which it was collected, shall be deemed a misdemeanor and upon conviction in a court having jurisdiction thereof, the person so convicted shall be fined in an amount equal to the sum that should have been levied and collected, or for any misappropriation of the moneys so collected, in an equal amount to the sum not applied as in this act provided, and imprisoned as in other cases of misdemeanor, in the discretion of the court. And if the said proper officer or officers shall fail to levy the taxes as in this act provided he or they may be compelled to perform such duty by any court having jurisdiction thereof. Provided, that in case of such failure, the territorial board of equalization, or, upon their failure to act, the territorial auditor shall levy sufficient taxes in the different counties, municipalities and school districts to carry out the provisions of this act and the act of which this is supplemental. Said board and auditor, or either of them, may require the proper officer or officers of the county, municipality or school district, whose indebtedness has been refunded, and it shall be their duty to furnish said board or auditor such information as will enable said board or auditor to carry out the provisions of this act and said act of Congress. When the tax is so levied by the territorial board of equalization or territorial auditor, he or they shall transmit to the board of supervisors, in the case of the county and school district tax, and to the proper officers in the case of municipal tax, or to such other officer or officers exercising like duties, a statement of the rate of taxes fixed and levied upon the property within said county, municipality or school district, for the purpose aforesaid, and the proper county, municipal and school district officers shall enter upon the tax-roll and proceed to collect the tax levied, as other county, municipal and school district taxes are collected.

SEC. 6. The board of supervisors of each county shall fix and define the boundaries of each school district within the county, and all taxable property and the increase thereof, within the limits of each county, municipality or school district, is hereby pledged to the payment of any and all bonds and the interest thereon issued for the benefit of such county, municipality or school district respectively. And

in the event of the division, disincorporation or dissolution in any manner of any such county, municipality or school district, the board of supervisors of each county, or other board of officers exercising the like duties, and in case of their failure to act, then the territorial board of equalization, and upon their failure to act the territorial auditor or other officer exercising the like duties, shall cause the proper taxes to be assessed and levied upon the taxable property within the limits of such county, municipality or school district, at and from the time of the issuance of the bonds for its benefit, to meet the payment of such bonds and the interest thereon.

SEC. 7. Any person holding bonds, warrants or other evidence of indebtedness of the Territory of any county, municipality or school district within the Territory, existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this act at no less than their face or par value and the accrued interest at the time of exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon.

SEC. 8. The provisions of said act of Congress relating or applying to the liquidation, refunding and redeeming of the territorial indebtedness, sale or exchange of bonds, receiving and applying the proceeds, shall apply and be the method used for the liquidation, refunding and redeeming the payment of the indebtedness of the counties, municipalities and school districts of this Territory authorized and contemplated by said act. And the loan commissioners shall at no time issue to any county, municipality or school districts any bonds created under this act or said act of Congress, without requiring from the officer or officers receiving the same, a bond as is required of the territorial treasurer, by section 6 of said act of Congress; and the said officer or officers shall give such bond, and no bonds shall be issued to any county, municipality or school district except in exchange for the bonds, warrants or other evidences of indebtedness for the redemption of which the refunding bonds were issued.

SEC. 9. Each county, municipality and school district shall pay into the territorial treasury its *pro rata* of the costs and expenses incurred and paid by the Territory for the refunding, redeeming and payment of the indebtedness of said county, municipality or school district.

SEC. 10. This act shall take effect and be in force from and after its passage.

Approved March 19, 1891.

No. 33.

An act to provide for funding territorial indebtedness only incurred since December 31st, 1890, in accordance with an act of Congress entitled "An act approving, with amendments, the funding act of Arizona, approved June 25th, 1890," and approved August 3rd, 1894.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SEC. 1. That an act entitled "An act to amend section 15 of an act approving, with amendments, the funding act of Arizona, approved June 25th, 1890," and approved August 3rd, 1894, be and the same is hereby now re-enacted, as of the date of its approval, and the Territory of Arizona by this act ratifies and confirms the objects, purposes, and provisions thereof, and the loan commissioners of the Territory of Arizona, are hereby authorized and directed to provide for the liquidation, funding and payment of all territorial indebtedness, incurred since December 31st, 1890, for necessary and current expenses in carrying on the territorial government, and for all territorial indebtedness that may hereafter be incurred for the necessary and current expenses of carrying on the territorial government for the years ending December 31st, 1894, and December 31st, 1895, by the issuance of bonds of said Territory, as authorized by the acts of Congress, in relation thereto, making the interest thereon payable semi-annually in gold coin of the United States.

SEC. 2. The Territory of Arizona accepts the terms and conditions expressed in said act of Congress, for the liquidation, funding and redemption of said territorial indebtedness, and the method therein provided, for liquidating, funding and redeeming said indebtedness, shall apply and be the method employed and used in liquidating, funding and redeeming said indebtedness, and the said loan commissioners are hereby empowered and authorized to exchange territorial funding bonds for any of the indebtedness mentioned in section 1 of this act, or sell said bonds and apply

the proceeds thereof to the payment of said indebtedness, as provided by the said acts of Congress and the laws of the Territory of Arizona.

SEC. 3. This act shall take effect and be in force from and after its passage.

J. H. CARPENTER,
Speaker of the House.

A. J. DORAN,
President of the Council.

Approved this 19th day of March, 1895.

LOUIS C. HUGHES, *Governor.*

No. 78.

An act to limit the expense of the loan commission of the Territory of Arizona.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. That the loan commission of Arizona shall not exceed in expenses one and one-half per cent. (1½ %) of each loan negotiated by them in behalf of the Territory.

SEC. 2. The members of the loan commission shall receive no *per diem* for their services, and the secretary of the loan commission shall not receive a salary exceeding twenty-five dollars ($25.00) per month.

SEC. 3. All acts and parts of acts in conflict with this act are hereby repealed.

SEC. 4. This act shall take effect and be in force from and after its passage.

D. G. CHALMERS,
Speaker of the House.

FRED G. HUGHES,
President of the Council.

Approved March eighteenth, 1897.

B. J. FRANKLIN, *Governor.*

No. 32.

An act to abolish the loan commission and to repeal sundry laws relating thereto.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. That paragraph 2039, section 1, chapter 1, title 31, of the Revised Statutes of the Territory of Arizona; also that section 1 of act No. 79, Session Laws of the Sixteenth Legislative Assembly of the Territory of Arizona; also act No. 33 and act No. 74, Session Laws of the Eighteenth Legislative Assembly of the Territory of Arizona, are hereby repealed.

SEC. 2. This act shall take effect and be in force from and after its passage.

This bill having been returned by the governor, with his objections thereto, and, after reconsideration having passed both houses by a two-thirds vote of each house, has become a law this 13th day of March, A. D. 1899.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 388.

N. O. MURPHY, C. H. AKERS, AND J. W. VICKERS AND N. O. MURPHY, GOVERNOR; C. H. AKERS, SECRETARY, AND J. W. VICKERS, AUDITOR OF THE TERRITORY OF ARIZONA, CONSTITUTING THE BOARD OF COMMISSIONERS STYLED THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, APPELLANTS,

vs.

JAMES L. UTTER AND GEORGE ALBRIGHT, WESLEY ALBRIGHT, AND WILLIAM H. McGINNIS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ELIZABETH B. VOORHIES, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal from the judgment of the supreme court of the Territory of Arizona against N. O. Murphy, governor of Arizona; C. H. Akers, secretary of the Territory,

and G. W. Vickers, auditor of the Territory, constituting the Board of Loan Commissioners of the Territory of Arizona, the successors in office to the respondents, B. J. Franklin, C. P. Leach, and C. N. Bruce and their successors in office as such Loan Commissioners, commanding them, upon the tender by the plaintiffs of $150,000 of the bonds of the county of Pima of the denomination of $1,000 each and bearing date on or about the first day of July, 1883, with the coupons then thereto attached, to make, issue, and deliver to the petitioners negotiable bonds of the Territory of Arizona, as provided in the act of Congress entitled "An act approving with amendments the funding act of Arizona," approved June 5, 1890; also the act of Congress entitled "An act to amend an act," and an act approving with amendments the funding act of Arizona approved June 25, 1890; approved July 13, 1892; also an act of Congress entitled "An act to amend section fifteen of an act approving with amendments funding act of Arizona," approved June 25, 1890; approved August 3, 1894; also an act of Congress entitled "An act amending and extending the provisions of an act of Congress entitled An act approving with amendments the funding act of Arizona," approved June 25, 1890, and the act amendatory thereof and supplemental thereto approved August 3, 1894; approved June 6, 1896; such bonds to be made, issued, and delivered to the petitioners or their attorney in exchange for the said 150 of the bonds of the county of Pima, as described in said petition, and for the accrued and unpaid interest thereon upon the surrender of said bonds and all unpaid coupons thereto attached.

This case was before this court under the style of Utter

et al., appellants, *vs.* Franklin *et al.*, as reported in 172 U. S., page 16, on a petition for a writ of mandamus to compel the defendants therein, who were then the respective governor, auditor, and secretary of the Territory, and who by virtue of their offices constitute the Loan Commissioners of the Territory of Arizona, to issue certain bonds in exchange for bonds issued by the county of Pima in aid of the Arizona Narrow Gauge Railroad Compay. The aggregate amount of the principal and interest on the bonds sought to be funded was at that time $289,964.50.

This case on the original petition was decided on the demurrer to the petition in favor of the Loan Commission and against the petitioners by the supreme court of the Territory of Arizona, and upon appeal to this court was reversed and remanded to the court below with direction to proceed in said cause not inconsistent with the provisions of the opinion of this court. The record being returned to the supreme court of the Territory, the Loan Commission were allowed to make answer setting up matters of defense to the petition. The case was then tried before the supreme court of the Territory and the judgment rendered as above stated.

The statement of facts made by the supreme court of the Territory are fully set out in the record at pages 91 to 109, and we do not deem it necessary to make any further statement of the facts in the case for the purpose of presenting the errors here relied upon for a reversal of this judgment. We urge especially the following, which are presented in the assignment of errors, as reasons why the judgment of the lower court should have been in favor of the present Loan Commission and why this court should so hold:

First. The supreme court of Arizona erred in rendering this judgment, for the reason that the original defendant, Benjamin J. Franklin, had departed this life long before this judgment was rendered, and the other defendants, C. N. Bruce and J. C. Leach, had long since ceased to be the secretary and auditor, respectively, of the Territory of Arizona, and therefore not the Loan Commission of said Territory.

Second. The court erred in holding that the cause of action survived against N. O. Murphy, C. H. Akers, and George W. Vickers, who were then the governor, secretary, and auditor of the Territory of Arizona and then the Loan Commission of said Territory, for the reason that the writ cannot run against them as the successors of Franklin, Leach, and Bruce, and for the further reason that no demand was ever made upon them to fund the bonds in question.

ARGUMENT.

The errors here assigned may be considered together. It will be observed from reading the judgment of the supreme court of the Territory that this writ is made exclusively against the individuals in the writ mentioned, viz., N. O. Murphy, C. H. Akers, and George W. Vickers. The writ is not made or addressed, and neither could it be, to the office of the Loan Commission, but it runs against the commands of the individuals in person who by law comprise that commission. The contention of the individuals composing this Loan Commission is that the rule as laid down by this court as governing public officers of the United States should be applied to them. This board is in no sense

a municipal board. While it is true it is a continuing board, it is not true that it is a continuing corporation. It stands in the same relation to the Federal government, so far as its duties are concerned, under the present law, at the time this action was brought, as any of the Cabinet Officers of the United States. The governor and secretary, who form the chief officers of the board, are both United States officers, both being appointed by the President and confirmed by the Senate, and hold their tenure of office for the term mentioned in their commission, subject at all times to removal by the President at his will and discretion, and may at any time that suits their convenience or pleasure resign their office. The Board of Loan Commissioners, as said before, is not a corporation. It is not capable of suing or being sued as provided for corporations any more than the office of the Secretary of the Interior or of the Secretary of War. Their duties as commissioners are simply incident to the office of governor, secretary, and auditor of the Territory.

While it is true that this Loan Commission was originally created by an act of the territorial legislature known as chapter 31 of the Laws of 1887, paragraphs 29–30, section 1, of which reads as follows:

"For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona, and such future indebtedness as may be, or is now authorized by law, the governor of said Territory together with the territorial auditor and the territorial secretary, and their successors in office shall constitute the Board of Commissioners to be Loan Commissioners of the Territory of Arizona and shall have and exercise the powers and duties hereinafter provided."

The act of Congress approved June 25, 1890, re-enacts this statute verbatim. And while the commission consists of the governor, secretary, and auditor, and their successors in office, the writ in this case issued directly at the officers themselves, and to their successors in office.

It has been held by repeated decisions of this court that a petition for a writ of mandamus to a public officer of the United States abates by his resignation of his office. This rule has been so uniformly followed by this court that it is only necessary to call the attention of the court to its statement of this proposition in the case of Warner Valley Stock Company *vs.* Smith, 165 U. S., on page 31, and cases there cited by the court.

This court, in the case above cited, used the following language, which seems to us pertinent to the present case:

"The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom it is sent.

"If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and rests upon the avowed and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence it is an imperative rule that previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant; and it must appear that the refusal to comply with such demand was either in direct terms or by conduct from which a refusal can be conclusively referred. Thus it is the

personal default of the defendant that warrants impetration of the writ; and if a peremptory mandamus be awarded, the costs must fall upon the defendant. It necessarily follows from this that on the death or retirement from office of the original defendant the writ must abate, in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased, and if a successor in office may be mulcted in costs for the default of his predecessor, without any delinquency of his own. Besides, were a demand made upon him he might discharge the duty and render the interpretation of the court unnecessary. At all events, he is not in privity with his predecessors, much less is he his predecessor's personal representative" (17 Wall., 607, 608 and 165 U. S., 32).

The case of a public officer of the United States differs in this respect from that of a municipal board, which is a continuing corporation (although its individual members may be changed) and to which in its corporate capacity a writ of mandamus may be directed. As was said in Commissioners *vs.* Sewell, 99 U. S., 627:

"The cases in which it has been held by this court that an abatement takes place by the expiration of the term of office have been those of officers of the Government, whose alleged delinquency was personal and did not involve any charge against the Government whose officers they were. A proceeding against the Government would not lie" (103 U. S., 484, 485).

The same is equally true as to the Territory. No action can be maintained against it.

Precisely the same thing is true in the present case as was

true in Warren Valley Stock Co. *vs.* Smith. Both are continuing offices, viz., the office of Secretary of the Interior and the office of Loan Commissioner; the duties of each are alike performed by United States officers appointed by the President and confirmed by the United States Senate, without which no duty could be created and no act performed. The case at bar is quite different from the case of Commissioners *vs.* Sewell, 99 U. S., 624. In that case the county was the corporation and the commissioners but its officers, and the writ ran against the corporation, and whoever the officers were they should perform the duty, and the costs would go against the corporation and not against the officers. In the present case the costs cannot go against the Territory or any one else except N. O. Murphy, C. H. Akers, and George W. Vickers, and that for the sole reason of a violation of duty by Franklin, Bruce, and Leach, their predecessors in office, this exact question was passed on by this court in the case of Warren Valley Stock Co. *vs.* Smith, 165 U. S., 30 or 32, and there held that the successor in office, being a United States officer, could not be so held, and that the writ abated. We therefore respectfully submit that this case should be governed by the same rule, and that this action should abate.

C. F. AINSWORTH,
Attorney General of Arizona.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 338.

N. O. MURPHY, C. H. AKERS, AND J. W. VICKERS, AND N. O. MURPHY, GOVERNOR; C. H. AKERS, SECRETARY, AND J. W. VICKERS, AUDITOR OF THE TERRITORY OF ARIZONA, CONSTITUTING THE BOARD OF COMMISSIONERS STYLED THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, APPELLANTS,

vs.

JAMES L. UTTER AND GEORGE ALBRIGHT, WESLEY ALBRIGHT, AND WILLIAM H. McGINNIS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ELIZABETH B. VOORHEES, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

ADDITIONAL BRIEF FOR APPELLANTS.

A main contention for the petitioners herein is that the act of Congress of June 6, 1896, is, as to the bonds involved herein, mandatory as to funding and not permissive merely,

as respondents maintain. In construing this act and attempting to meet some points in the brief of petitioners, it is to be observed:

I.

This act should be considered *in pari materia* with the acts which it amends.

In terms it amends the provisions of the acts of Congress of June 25, 1890, and August 3, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona.

Referring to the act of August 3, 1894, it is seen that it amends only paragraph 2252 (section 15) of the act of June 25, 1890, which paragraph permits the funding of certain indebtedness in excess of the limitations of the Harrison act. This is the sole subject touched on by the amendment.

This court in its opinion in the Schuerman *vs.* Arizona case (decided March 3, 1902) cites with approval the language of the Supreme Court of Arizona in that case, where, construing these several acts, it is said:

"It is to be noted that, in both the acts referred to, the only limitation imposed had reference to the class of obligations which were permitted to be funded, and did not in any manner restrict the territorial officers in the method of their procedure previously prescribed by the territorial law, or limit the time within which the acts of funding, by the sale and disposition of bonds, might lawfully be done. Bearing in mind the remedial character of this legislation, and reading the act of June 6, 1896, in the light of the previous congressional enactment upon the same subject-matter, we construe the former act to express only what obviously appears to be

the congressional intent, to extend and enlarge the class of obligations which may be funded."

And this court said in Utter *vs.* Franklin, 172 U. S., 416, construing this act of June 6, 1896:

"Its evident purpose was to authorize the funding of all outstanding bonds," etc. * * * "The second section deals with the original bonds which had not been theretofore funded, and provides that all such as had been theretofore issued under the authority of the legislature, and which by the first section were authorized to be funded, should be confirmed, approved and validated, and might be funded until January 1, 1897."

II.

The act of June 6, 1896, being amendatory of the act of July 25, 1890, must be considered as part of that act, and therefore, so far as the funding of obligations is concerned, as "subject to future territorial legislation," just as the act of July 25, 1890, is expressly stated to be.

Congress, in approving and confirming the funding act of Arizona of 1887, left it "subject to future territorial legislation." It would seem that it would have been subject to such legislation without this statement by Congress, but as indicating the fact that, as the act had emanated from the Arizona legislature, it was to remain under its control, Congress expressly so stated. What is the construction to be given to these words? To what legislation was this territorial act, which remained a territorial act after its approval by Congress, to be subject? The answer seems to be, to any future territorial legislation. It would seem to be manifest, and we

so submit, that this funding act of 1887 remained, after its approval, subject to territorial legislation just as fully as before it was approved and confirmed. Prior to the approval of the territorial act by Congress, as a matter of course, the territory had the absolute power to abolish the commission which it had created. Congress in approving the act did not take away any of the powers of the territory. On the contrary, it enlarged these powers as to certain indebtedness which might be funded. By the organic law, which provides that the power of the legislature of Arizona shall extend "to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," the territory had the power to create and also to abolish a loan commission. In the act of July 30, 1886, it was expressly stated that nothing therein should be construed to prohibit the refunding by the territory of any existing indebtedness. Congress thus continued to leave with the territory plenary power as to funding. The territory therefore had this power when it passed the funding act of 1887. This power was left with it after the act was approved by Congress in 1890. "Subject to future territorial legislation" would therefore appear to mean, not only in the unrestricted application of the words themselves, but also in view of the powers of the legislature, the same unrestricted power of legislation which the territory had before the approval by Congress of the territorial act of 1887, which would include the power to abolish the commission.

III.

This construction will be seen, so we think, to be in harmony with the policy as to territorial government announced by this court in Clinton *vs.* Englebrecht, 13 Wall., 434, and other cases quoted in our main brief and again as follows:

"The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress."

One of these powers, consistent with what seems to have been adopted as a fundamental principle, is the power of funding. This seems to be, and always to have been, in the contemplation of Congress, a matter of local self-government. As above indicated, the territorial funding act emanated first from the legislature of Arizona under the powers expressly given to it by Congress. It was a thought or purpose which had no place in the mind of Congress until presented to that body by the people of Arizona through its chosen body, the legislature. Congress by the Harrison act having left the subject of funding entirely to the legislatures of the territories, it seems clear that no funding law would have ever had an existence as an independent creation by Congress. Congress has never passed such a law, nor could it do so without a reversal of that which has always been its policy. The approval by Congress of the funding act of 1887 was a positive assurance that such law was within the

power of the Arizona legislature to pass, and we submit that it is a necessary conclusion that the body which had power to create the commission had also the power to abolish it.

As was said by Chief Justice Marshall in U. S. *vs.* Fisher, 2 Cranch, 358, 390:

"Where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intent must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.

"The intention of the legislature in enacting a particular statute is not to be ascertained by interpreting the statute by itself alone, and according to the mere literal meaning of its words. Every statute must be construed in connection with the whole system of which it forms a part and in the light of the common law and of previous statutes upon the same subject. And the legislature is not to be lightly presumed to have intended to introduce a fundamental change in long-established principles of law. * * * It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words simply because, in their widest, and perhaps natural, sense they have that meaning, would be to give them a meaning in which they are not really used."

Black on Int. of Law, 110, and cases cited.

IV.

These views are, it is believed, fully supported by the facts as appearing in the memorial of the Arizona legislature, in response to which, as stated by this court in the Schuerman case, the second section of the act of June 6,

1896, was passed. This memorial recites, in effect, that certain bonds had been issued in good faith and were held by *bona fide* holders; that under the inducements held out in the issuance of these bonds large sums of money had been invested; that the validity of the bonds had been recognized by the payment of interest, but that, owing to the decision of this court in Lewis *vs.* Pima County, there was a doubt as to the validity of the bonds, and therefore the legislature "adopted a memorial asking Congress to pass such curative legislation in regard to such bonds as would protect the bondholders, when such bonds had been issued under the authority of the acts of the territorial legislature. It was, therefore, the desire of the territory of Arizona to have the bonds validated, and that they should be paid and to pay them" (Opinion of this court in the Schuerman case).

What was the mischief and the sole mischief which Congress was requested to remedy? Evidently it was only the lack of authority in the issuance of the bonds. If this defect were cured as prayed for by the Arizona legislature, the bonds would be validated and legal in every respect. With this defect removed, they would be on the same footing as indebtedness the validity of which had never been questioned, and might be funded or not, as seemed best to the Arizona legislature. It is not to be supposed that the act of June 6, 1896, would have been passed except for the memorial of the Arizona legislature. Considering the object of this memorial as above stated and the fact that the act of June 6, 1896, was passed to remedy the mischief suggested in the memorial, it seems wholly unwarranted to argue that Congress had any object in view except to cure the defect and validate the bonds referred to. There is, so

we submit, absolutely nothing in the act itself or the facts occasioning the passage of the act to warrant the argument that Congress intended to change its fixed policy of leaving to the territories the right to fund or not to fund their indebtedness.

It was suggested by appellees at the argument that at the time of the passage of this act of June 6, 1896, there were outstanding bonds with large accumulations of unpaid interest, and that for this reason it must be assumed that Congress made imperative the funding of such obligations. But with profound respect we submit that such an assumption is at variance with the facts as presented in the memorial from Arizona, the prominent feature of which is the assertion that the validity of the bonds which it was desired to validate had been recognized by the payment of interest. As hereinbefore stated, all that was needed to protect the bondholders was to cure the defect as to the lack of authority in issuing the bonds. The funding act of 1887 was passed long after the issuance of any of the bonds referred to in the memorial, and at the time such bonds were issued there was no funding law of any kind. The remedy of funding was therefore no part of the original contract. No consideration passed from the bondholders by virtue of which they could claim that they had a vested right to fund. Whether or not it was best to provide or continue a commission for the funding of bonds was, we have urged, a question of local financial policy to be determined by the Arizona legislature, and in the act of June 6, 1896, as though to emphasize the fact that the whole question of the payment of these bonds (whether by funding or otherwise) was one for the territory to deal with, Congress expressly provided that nothing

should be so construed as to make the Government of the United States "responsible for the payment of any of the bonds, warrants, or other evidences of indebtedness by this act approved, confirmed and made valid, and authorized to be funded."

V.

But if we were left merely to a cold, technical construction of the act of June 6, 1896, it would seem to be clear that, notwithstanding the use of the word "shall," the act is permissive only and not mandatory. However broad some of the expressions of a statute may be, yet if, on examination, it clearly appears that they are and were intended to be limited by other provisions of the same or other acts on the same subject, it cannot be improper to restrain them accordingly (The Elizabeth, 1 Paine, U. S., 11).

General words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate objects of the act and as not altering the general principles of the law.

River Wear Coms. *vs.* Adamson, 1 Q. B. Div., 546; 2 App. Cases, 743.

Under this familiar principle the first section of the act of June 6, 1896, providing that certain bonds, etc., shall be funded, is limited and the words defined by the second section of the act which provides that bonds "as hereinbefore authorized to be funded are hereby confirmed, approved and validated, and may be funded as in this act provided until January 1st, 1897," and by the last two lines of the act which refer to the said bonds, etc., "by this act approved, confirmed and made valid, and authorized to be funded."

"Shall" ought undoubtedly to be construed as meaning "must" for the purpose of sustaining or enforcing an existing right, but it need not be for creating a new one.

West Wisconsin R'y Co. *vs.* Foley, 94 U. S., 100, 103.

As against the Government the word "shall," when used in statutes, is to be construed as "may," unless a contrary intention is manifest.

Railroad Co. *vs.* Hecht, 95 U. S., 168, 170.

It is a well-settled rule that the word "shall" may receive a permissive rather than an imperative interpretation when necessary to carry out the true intent of the provision in which such word is found.

Endlich Int. Stat., sec. 316.
Potter's Dwar. Stat., 220.
Sedgwick Stat. & Const. Law, 438, 439.

Statutes are mandatory where the public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the power be exercised.

Blake *vs.* Portsmouth, etc., R. R., 39 N. H., 435.
The Newburgh Turnpike Coal *vs.* Miller, 5 John Ch. R., 112.

In regard to funding, the Arizona legislature has declared by the repeal of the Loan Commission that the public interests do not demand the funding of the bonds, and we have attempted to show in our main brief that the bondholders have no claim *de jure* that the power be exercised. As to them the offer is a pure gratuity without any consid-

eration on the part of the bondholders, and might therefore be withdrawn even under the express language of this court in the case of Memphis *vs.* U. S., 97 U. S., 293, cited in the brief for appellees on page 100, and relied on as being on all-fours with the present case. We must submit our respectful opinion that it is wholly different from the case at bar, and in support of this opinion of ours have to say, in brief, that the court stated in this Memphis *vs.* U. S. case that "we think the relator had acquired a vested right by his judgment," etc.; but the court goes on to say, "We do not deny that it is competent for a legislature to repeal an act, which when it was passed was a mere gratuity, if while it was in existence no vested rights have been acquired under it or in virtue of it."

The opinion of this court in Durkee *vs.* Board of Liquidation, 103 U. S., 646, cited on page 60 of our main brief, is absolute to the effect that where no consideration passes from the holder of the bonds no vested right is acquired to fund them, and the offer may be withdrawn.

The radical difference, as it occurs to us, between the case cited by appellees and the present case is that in the one a vested right had been acquired, and in the present case there was no vested right.

The Loan Commission having been abolished without any reservation as to pending proceedings and no vested rights having been acquired by the bondholders, the effect of the repealing act was to take away the jurisdiction of the lower court to proceed further in this case which was founded upon the act repealed. (See *In re* Hall, petitioner 167 U. S., 38, and other cases cited on page 65 of our main brief.) As, at the time of the judgment herein appealed

from, there were no officers constituting the Loan Commission against whom a writ could run, it is submitted that this action abated, and that the judgment below was erroneous, and that this case should be reversed and remanded, with directions to the lower court to dismiss the petition or to enter judgment for defendants.

Respectfully submitted.

ROCHESTER FORD,
Of Counsel for Appellants.

Office Supreme Court U.S.
FILED
OCT 9 1901
JAMES H. McKENNEY
Clerk

No. 388.

For Dillon, Hubbard, Dillon & Barnes for Appellees

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 388.

Filed Oct. 9, 1901.

N. O. MURPHY ET AL., Loan Commissioners of the Territory of Arizona,

v.

JAMES L. UTTER ET AL.

Notice of Motion.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

To HON. C. F. AINSWORTH,
Attorney-General of the Territory of Arizona, and
ROCHESTER FORD, ESQ.,
Attorney for Appellants.

Please take notice that the appellees in the above-entitled cause will present to the Supreme Court of the United States, on Monday, October 14, 1901, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, a motion to advance the above-entitled cause under and pursuant to the rules of that Court in that behalf made and provided, copy of which motion is hereto attached.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
W. H. BARNES,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 388.

N. O. MURPHY ET AL., Loan Commissioners of the Territory of Arizona,
v.
JAMES L. UTTER ET AL.

Motion.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Come now the appellees, by their counsel appearing in that behalf, and move the Court to advance the above-entitled case for hearing.

The grounds of said motion are as follows:

This case has already been once before this Court, and adjudicated by it upon the merits, as will appear by the report thereof (see *Utter* v. *Franklin*, 172 U. S., 416, January 3, 1899), and the same case is now again brought up by the present appeal, and this case is therefore entitled to be advanced under and pursuant to paragraph 4 of Rule 26 of this Court.

This case *reported under the name of Utter* v. *Franklin* is a proceeding by mandamus to compel the Loan Commissioners of the Territory of Arizona to fund certain bonds held by the relators. The question whether it was the legal duty of the Loan Commissioners to fund these very bonds was the very question adjudicated by this Court in this case on the

former appeal. The opinion, which was unanimous given by Mr. Justice BROWN, concludes as follows (172 U. S. p. 425):

"We are, therefore, of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question, and that

The order of the Supreme Court of the Territory must be reversed, and the case remanded to that court for further proceedings not inconsistent with the opinion of this court."

The Supreme Court of the Territory, instead of proceeding to carry out said opinion and judgment of this Court and issue its mandate accordingly, when the cause was remanded, allowed the defendants over the objection of the appellees, to reopen and relitigate the question of their duty to fund the said bonds, and to plead alleged new defenses and produce new evidence, thereby delaying the hearing of the said case from the date of the rendering of said decision of this Court, January 3, 1899, down to June, 1901, at which time the Supreme Court of the Territory of Arizona rendered its judgment in favor of the relators, and ordered, pursuant to the opinion and judgment of the Supreme Court of the United States, the relators' bonds to be funded. From that judgment the present appeal has been taken by the defendants and the present record presents the same question which was adjudicated by this Court on the said former appeal.

The present motion is made in order to ask this Court to advance this case for an early hearing, to the end that the relators may obtain the actual relief to which this Court and also the Supreme Court of the

Territory of Arizona have adjudged them to be entitled, and to the end that further delay may be avoided, and that the relators may have the benefit of the provisions of Rule 26 of this Court, permitting the advancing of cases once adjudicated by this Court on the merits and again brought up on appeal, on motion of either party.

Respectfully submitted.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
W. H. BARNES,
Attorneys for Appellees.

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On the issue of the mandate of the Supreme Court of the United States to the Supreme Court of the Territory of Arizona, reversing the judgment of the Supreme Court of Arizona, and remanding the cause for further proceedings not inconsistent with the opinion of the Supreme Court of the United States, it was the duty of the Supreme Court of the Territory to issue a peremptory writ of mandamus commanding the Loan Commissioners to fund the bonds in question, as expressly directed by the opinion of the Supreme Court of the United States, and the Supreme Court of the Territory had no authority to grant a new trial, a rehearing or a review, or to permit any new defense on the merits to be introduced by amendment to answer or otherwise. Therefore, the judgment finally en-

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Act of Congress, entitled "An Act approving, with amendments, the funding act of Arizona," approved **June 25, 1890.** (Reprinted in brief in *Utter vs. Franklin*, p. 78, and in the Appendix to this brief, p. 128.)

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Act of Congress, entitled "An Act to Amend an act, entitled 'An Act approving with amendments the funding act of Arizona,' approved June twenty-fifth, eighteen hundred and ninety," approved **July 13, 1892.** (Reprinted in brief in *Utter vs. Franklin*, p. 89.)

Act of Congress, entitled "An Act to amend Section fifteen (15) of an Act approving, with amendments, the funding Act of Arizona, approved June twenty-fifth,

eighteen hundred and ninety," approved **August 3, 1894.** (Reprinted in brief in *Utter vs. Franklin*, p. 90.)

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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 388.

N. O. Murphy, C. H. Akers, and J. W. Vickers, and N. O. Murphy, Governor; C. H. Akers, Secretary, and J. W. Vickers, Auditor, of the Territory of Arizona, Constituting the Board of Commissioners, styled the Loan Commissioners of the Territory of Arizona,

Appellants,

vs.

James L. Utter, and George Albright, Wesley Albright and William H. McGinnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Brief for Appellees.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
WM. H. BARNES,
Counsel for Appellees.

STATEMENT OF THE CASE.

This is an appeal by the Loan Commissioners from a judgment, dated March 22, 1901, of the Supreme Court of the Territory of Arizona (Record, p. 113), granting a peremptory writ of mandamus directed to N. O. Murphy, Governor; J.W. Vickers, Auditor, and Charles H. Ackers, Secretary, the present Loan Commissioners of the Territory of Arizona, being successors in office to respondents, Franklin, Leitch and Bruce, and their successors in office, as such Loan Commissioners, commanding them, upon tender by the plaintiffs of the $150,000 bonds of the county of Pima, and coupons attached, described in the petition, to fund the same by the issuance of bonds of the Territory of Arizona, pursuant to the acts of Congress, citing them.

This same case was before this court at the October Term, 1898, being No. 94 on the docket of that term, and is reported under the name of *Utter vs. Franklin*, 172 U. S., 416. It was decided by this Court January 3, 1899. That was an appeal by Utter *et al.*, holders of the bonds, from a final judgment of the Supreme Court of the Territory, refusing a writ of mandamus for the funding of the bonds. The facts in that case are stated by Mr. Justice BROWN as follows (172 U. S., 416):

"This was a petition for a writ of mandamus to compel the defendants, who were respectively governor, auditor and secretary of the Territory, acting as loan commissioners, to issue certain bonds in exchange for bonds issued by the county of Pima in aid of the Arizona Narrow Gauge Railroad Company.

"The petition set forth that plaintiffs were the *bona fide* holders for value of certain seven per cent. bonds and coupons issued in July, 1883, in compliance with an act of the Territory 'to promote the construction

of a certain railroad', approved February 21, 1883, aggregating, including principal and interest thereon, the sum of $289,964.50. There was a further allegation in the petition that it was the duty of the defendants to provide for the redeeming of such indebtedness and to issue refunding bonds therefor; that plaintiffs had made demands for the same, which defendants had refused.

"Defendants demurred to the petition, and for answer thereto averred that the bonds now held by the plaintiffs had been declared, both by the Supreme Court of the Territory and by this court, to be void, and therefore the petition of the relators should be dismissed.

"The petition being denied by the Supreme Court of Arizona, the relators appealed to this court. No opinion was filed in the Supreme Court of the Territory."

Giving the opinion of the court, Mr. Justice BROWN said (p. 417):

"The bonds now held by the relators were declared to be invalid by this court in *Lewis v. Pima County*, 155 U. S., 54, upon the ground that bonds issued in aid of railways could not be considered debts or obligations 'necessary to the administration of the internal affairs' of the county, within the meaning of the act of June 8, 1878, c. 168, 20 Stat., 101.

"Whether the loan commissioners of the Territory can be required to refund these obligations and issue new bonds to the holders thereof, depends upon the effect given to certain legislation upon this subject, both by Congressional and territorial statutes. These statutes were enacted both before and after the decision in *Lewis v. Pima County, supra.*"

After considering the rights of the petitioners under this legislation, this court decided, as stated in its opinion (p. 425):

"We are, therefore, of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question, and that

"*The order of the Supreme Court of the Territory must be reversed, and the case remanded to that court*

for further proceedings not inconsistent with the opinion of this court."

When the mandate went down from this court to the Supreme Court of the Territory, that court, instead of immediately entering a judgment ordering the loan commissioners to fund the bonds in question in accordance with the opinion of this court, permitted the defendants to file what they call their "first amended return" (Record, p. 8), setting up and pleading *seventeen new defenses*, and this was permitted, although the defendants had in the first trial full opportunity to plead, and were required by the laws of Arizona to plead, all of their defenses in the one pleading, which, under the statutes of the Territory, must contain any and all demurrers, answers and defenses which the defendants desire to plead. Not only was this required by the laws of the Territory, but the original answer and response to the writ made by the defendants (Record, p. 7) did set up the demurrer of the defendants and also their answer, in which, under the statutes and practice of Arizona, they were required to state *all* their defenses. The petitioners demurred to the answer, and the cause was heard in the Supreme Court of the Territory on the petition, on the demurrer and answer of the defendants, and on the demurrer of the petitioners to the said answer.

On the former appeal the case was heard by this court, and decided on the record on the merits of the case, which was whether the petitioners were entitled to have their bonds refunded, and this court decided "*that it was made the duty of the loan commissioners by these acts to fund the bonds in question*," and remanded the case for further proceedings in accordance with this opinion (172 U. S., 416, 425).

Inasmuch, therefore, as the Supreme Court of the Territory of Arizona had heard the case on the merits, and inasmuch as this court had heard the case on appeal on the merits, and had decided that the bonds should be funded, and remanded the case for further proceedings in accordance with its opinion, it was the duty of the Supreme Court of the Territory immediately to issue its writ of mandamus to the defendants. Accordingly, the petitioners moved (Record, p. 22) to strike from the files the said so-called amended return of the defendants, for the reasons therein stated, namely, that

"1. The same was filed without leave of the court.
"2. By the decision, mandate and opinion of the Supreme Court of the United States in this case no new defenses or 'returns' can be considered by this court.
"3. This court in obedience to the mandate, opinion and decision of the Supreme Court of the United States has no power to do other than direct the issuance of the writ of mandamus as prayed for in the petition herein and execute the decision of the Supreme Court of the United States by ordering a proper writ in accordance with the issues heretofore herein joined and decided."

The Supreme Court of the Territory, however, overruled the motion and permitted the so-called amended return to be filed. To this ruling the petitioners duly excepted, and their bill of exceptions appears in the record (p. 49).

Inasmuch, however, as the petitioners could, on appeal, take advantage of the error of the Supreme Court of the Territory in permitting the amended return to be filed instead of issuing its writ of mandamus immediately on receipt of the mandate of this court *(Blake vs. McClung*, 176 U. S., 59*)*, the

petitioners decided not to apply to this court for a mandamus to require the Supreme Court of the Territory to carry the mandate of this court into execution, but to proceed with the case in the Supreme Court of the Territory and rely upon correcting any error by appeal. Accordingly, the petitioners filed their reply (Record, p. 43), and their amended reply setting forth copies of records of the board of supervisors of Pima county (Record, p. 50), to the said so-called amended return. The case was heard on these new pleadings. A referee was appointed, testimony was taken, and the Supreme Court of the Territory made its findings of fact (Record, pp. 91–109), and rendered judgment (all of the present appellants being before the Court) awarding a peremptory writ of mandamus directing the funding of the bonds, as above stated (Record, p. 113).

The point of the new defenses urged by the defendants was that the bonds were not issued in good faith in accordance with the act approved February 21, 1883. The defenses also set up that the railroad was not constructed as required by the said act, etc., etc. All of these defenses were found by the court to be without any foundation in fact.

From the judgment of that court the defendants have appealed to this court (Record, pp. 118–122).

Chronological Statement of Proceedings in this Case since the Mandate of this Court Went Down to the Supreme Court of Arizona.

The printed transcript of record now before this court is not arranged in chronological order. To aid

this court in its examination of the record, we make the following brief chronological statement of the case as it appears in various parts of the transcript of record.

An examination of pages 123–127 of the printed transcript shows in chronological order the proceedings which were had in the Supreme Court of the Territory of Arizona upon and after the receipt of the mandate from this court. If there appears (Record, p. 123) that on June 1, 1899, on receipt of the mandate from this court, the attorney for the petitioners suggested the death of Elizabeth D. Voorhies, and moved that George Albright, Wesley Albright and William H. McGinnis, as executors of the last will and testament of said Elizabeth D. Voorhies, be substituted for her [a similar suggestion of death and substitution of executors had already been ordered and made in the Supreme Court of the United States (Record, p. 34); and also moved for a writ of mandamus as prayed for in the petition (see written motion, Record, p. 21)]. The petitioners also moved to strike the so-called amended return from the files (Record, p. 22). The court set the motion for June 2, 1899, and on that date the motion was heard and the court ordered the said motion to be submitted on briefs (Record, p. 123).

On November 1, 1899 (Record, p. 124), the court made an order substituting the executors of the will of Elizabeth D. Voorhies, one of the petitioners, in her place. The court also granted respondents permission to file an amended return and answer, and granted petitioners leave to reply to said answer.

To the ruling of the court granting the respondents permission to file the so-called amended return, the

petitioners duly excepted, and the court signed a bill of exceptions on this ruling (Record, p. 49).

After this ruling of the court permitting the defendants to file the so-called amended return, and after the petitioners had duly excepted to such ruling, the petitioners filed their reply (Record, p. 43) and their amended reply (Record, p. 50), the latter setting forth copies of the records of the board of supervisors of Pima County, showing that the bonds in question were issued in accordance with the act approved February 21, 1883. Also on November 1, 1899 (Record, p. 124), the attorney for respondents moved that the case be referred to some court to take testimony and report to the court. Counsel stated that the issues were not fully made up, and the court stated that until the issues were made up the court could not act.

On January 12, 1900 (Record, p. 124), the attorney for the petitioners moved the Court to set the cause for trial. The attorney for the defendants moved that the cause be referred to the district court for Pima county (the county that issued the bonds in question), and tried before a jury!

On January 16, 1900 (Record, p. 125), the Court ordered that the motion of the respondents that the cause be referred to the district court of Pima county for jury trial be denied, and the court appointed Clinton D. Hoover to take evidence in the Territory, and that he have until March 26, and the Court ordered the cause set for hearing on March 26. Voluminous evidence was taken and was the basis on which the court made its findings of facts (Record, 91–109).

On March 26, 1900 (Record, p. 125), Attorney-General Ainsworth was granted leave to make a motion to dismiss. The motion is set forth in the Record (p. 69).

The alleged ground of the motion was that all the officers against whom the action was commenced had long since ceased to be officers of the Territory, their terms of office having expired. The Supreme Court of the Territory kept this motion to dismiss in abeyance until the cause came on regularly for a hearing, and on the hearing said in its opinion (Record, p. 81):

"We deem it sufficient to say that the weight of authority in the state courts is in favor of the view that the writ of mandamus operates on the office rather than on the individual who occupies the office, and therefore does not abate by a change of personnel in the office, and that no revivor is necessary against a successor of the officer against whom the proceedings were instituted. This also appears to be the rule as followed in the Supreme Court of the United States whenever a proceeding is to enforce a continuing duty against a corporation or municipality. *Thompson v. United States*, 103 U. S., 482; *Commissioners v. Ballou*, 99 U. S., 624. The loan commissioners were—by the statute creating the board—made a continuing body, and the delinquency complained of related to a continuing duty of the commission, and we see no reason why the docrine as applied in the above cases does not apply to the present proceeding (*Hollen Parker, Petitioner*, 131 U. S. 221)."

Also, on the same date, Monday, March 26, 1900 (Record, p. 125), the respondents made a motion for continuance on the ground of illness, want of preparation for trial, etc., and filed affidavits in support of the the same (Record, pp. 70–75). This motion for continuance was granted, and the cause was continued until June 1, 1900 (Record, p. 125).

On March 27, 1900 (Record, p. 75), counsel for the respondents made a motion to dismiss the petition on the alleged ground that the loan commission of Arizona had been abolished by act of the Arizona legislature,

No. 32, of the twentieth Legislative Assembly, passed in 1899, after the decision rendered by this court directing the bonds in question to be refunded. This motion, also, was kept under advisement by the Supreme Court of the Territory until the final hearing, and the opinion of the Supreme Court of the Territory discusses this motion and the alleged grounds for the same, and shows conclusively that the loan commission of the Territory had not been abolished (see opinion of court, Record, pp. 80–84).

On June 1, 1900, counsel for respondents made another motion for continuance, and filed affidavits in support of same (Record, pp. 76, 77). This time the court refused further to continue the case, and ordered (Record, p. 126) that the cause be submitted on briefs, which was accordingly done.

On June 2, 1900 (Record, p. 126), counsel for respondents moved that the petitioners be required to give security for costs, which motion was denied.

On March 22, 1901, the Supreme Court of the Territory decided the cause (Record, p. 126) in favor of the petitioners, and directed that the writ of mandate be issued as prayed for, requiring the loan commissioners to fund the bonds in question, together with the interest due thereon, under the provisions of the act of Congress of June 25, 1890.

Judgment to that effect was entered (Record, p. 113).

The court made findings of fact (Record, pp. 91–109).

The opinion of the court is given in the Record, pp. 80–89, and is the unanimous opinion of all the four justices of the Supreme Court of the Territory of Arizona.

On June 1, 1901, counsel for the defendants made a motion for a rehearing (Record, p. 109), also a motion

to reform the judgment (Record, p. 111), which motions were, upon consideration by the court, both denied (Record, p. 127).

Thereupon respondents prayed an appeal to the Supreme Court of the United States (Record, p. 127, pp. 118, 119), which appeal was allowed and perfected (Record, p. 127, pp. 119–122).

After the appeal was taken to this court by the respondents, the petitioners, pursuant to the rules of this court, moved to advance the case under paragraph 4 of Rule 26, as a case once adjudicated by this court upon the merits and again brought up by appeal. Counsel for respondents filed a printed brief opposing this motion. This court, however, made an order advancing the case, and set it for hearing, March 3, 1902.

ARGUMENT.

I.

On the issue of the mandate of the Supreme Court of the United States to the Supreme Court of the Territory of Arizona, reversing the judgment of the Supreme Court of Arizona, and remanding the cause for further proceedings not inconsistent with the opinion of the Supreme Court of the United States, it was the duty of the Supreme Court of the Territory to issue a peremptory writ of mandamus commanding the Loan Commissioners to fund

the bonds in question, as expressly directed by the opinion of the Supreme Court of the United States; and the Supreme Court of the Territory had no authority to grant a new trial, a rehearing or a review, or to permit any new defense on the merits to be introduced by amendment to answer or otherwise. Therefore, the judgment finally entered by the Supreme Court of the Territory, directing the funding of the bonds, is correct, and should be affirmed without regard to the new defenses and matters which were intruded into the case between the issuance of the mandate of this Court and the entry of such judgment.

We made this point in the Supreme Court of the Territory of Arizona when the mandate of this Court went down to that Court, and took a bill of exceptions (Record, p. 49) to the ruling of the Court, which permitted the defendants to make a so-called "amended return."

The brief of counsel for the appellants makes the claim that the court below was justified, after the mandate went down from this court, to go into the question, *de novo*, of the right of the relators to have their bonds funded. This cannot be done. The rule on this point is stated by Mr. Justice BROWN in *Ex parte The Union Steamboat Company*, 178 U. S., 317, 318, 319, where he says (p. 318):

"The duty of an inferior court upon receiving the mandate of this court is nowhere better described than by Mr. Justice BALDWIN in an early case upon that subject (*Ex parte Sibbald v. United States*, 12 Pet., 488, 492): 'Whatever,' said he, 'was before the court, and

is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded. * * * If the special mandate, directed by the twenty-fourth section [of the judiciary act], is not obeyed or executed, then the general power given to all courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, by the fourteenth section of the judiciary act, fairly arises, and a mandamus or other appropriate writs will go,' although an appeal will also sometimes lie (*Perkins v. Fourniquet*, 14 How., 328, 330; *Milwaukee & Minnesota Railroad Co. v. Soutter*, 2 Wall., 440, 443; See, also, *Boyce's Executors v. Grundy*, 9 Pet., 275; *Ex parte Dubuque & Pacific Railroad*, 1 Wall., 69; *Durant v. Essex Co.*, 101 U. S., 555; *In re Washington & Georgetown R. R. Co.*, 140 U. S., 91; *City Bank v. Hunter*, 152 U. S., 512; *In re City National Bank*, 153 U. S., 246; *In re Sanford Fork & Tool Co.*, 160 U. S., 247; *In re Potts*, 166 U. S., 263).

"It is equally well settled, however, that such writ, as a general rule, lies only where there is no other adequate remedy and that it cannot be availed of as a writ of error (*In re Pennsylvania Co.*, 137 U. S., 451; *In re Morrison*, 147 U. S., 14, 26; *Ex parte Railway Co.*, 103 U. S., 794; *Ex parte Baltimore & Ohio R. R. Co.*, 108 U. S., 566; *In re Atlantic City R. R.*, 164 U. S., 633). The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court (*In re Sanford Fork & Tool Co.*, 160 U. S., 247, 256, and the opinion of this court may be consulted to ascertain exactly what was decided and settled (*West v. Brashear*, 14 Pet., 51; *Supervisors v. Kennicott*, 94 U. S., 498; *Gaines v. Rugg*, 148 U. S., 228, 238, 244; *Sanford Fork & Tool Co.*, 160 U. S., 247, 256)."

We make and repeat this point here now, not because we have any doubt about the correctness of the judgment of the Supreme Court of the Territory on the facts as found by that Court after it went into an examination of all the questions made by the defendants in their so-called amended return, which that Court permitted the defendants to file over our exceptions, but because, if our proposition on this point is correct, of which we have no doubt, then it is unnecessary for this Court to consider the findings of fact made by the Supreme Court of the Territory, in detail and at length, *for that judgment must be sustained inasmuch as it is a judgment which the Court ought to have entered immediately upon the receipt of the mandate of this Court, without permitting any new defense to be made.*

That this point is open on writ of error or appeal, as well as on an application to this Court for a mandamus to enforce obedience to its mandate, see :

Blake vs. McClung, 176 U. S., 59, (s. c. on petition for mandamus, 175 U. S., 114.
Union Steamboat Company, 178 U. S., 317, and cases there cited.

It is equally open to us to say that the judgment in favor of the petitioners, which the Supreme Court of the Territory ultimately entered, is correct, because it is such a judgment as ought to have been entered immediately on receipt of the mandate. Not to have entered such a judgment would have been error which we would have had a right to have corrected on appeal on our bill of exceptions (Record, p. 49) to the ruling of the court permitting the defendants to make new defenses.

We proceed, therefore, in our argument in support

of the proposition above stated—namely, that the Supreme Court of the Territory should have entered a judgment of mandamus at once upon receipt of the mandate of this court, and should not have permitted new defenses to be introduced by amendment to answer or return.

Arizona Statutes Relating to Mandamus and Pleadings.

We print in the Appendix to this brief the sections of the statutes of Arizona relating to mandamus. These provide, among other things (section 2339, Revised Statutes of Arizona, 1887):

"On the return day of the alternative, or the day on which the application of the writ is noticed, or such further day as the court may allow, the party on whom the writ or notice shall have been served may show cause *by answer*, under oath, *made in the same manner as an answer to a complaint in a civil action.*"

The statutes regulating procedure in Arizona have adopted the modern system of pleading. They provide, as respects answers, as follows (Revised Statutes, Arizona, 1887, p. 165):

"653. *The pleadings* in all civil suits in courts of record *shall be by complaint and answer.*"

"655. The pleadings shall consist of a concise statement of the facts constituting the plaintiff's cause of action or the defendant's ground of defense."

"659. The complaint may contain several different causes of action, and *the answer may contain several different defenses.*"

"668. The complaint shall set forth clearly the names of the parties and their residences, if known, with a full and clear statement of the cause of action, without any distinction between suits at law and in equity, and shall also state the nature of the relief which he requests of the court."

Revised Statutes, 1887, p. 174:

"734. The defendant in his answer may plead as many several matters, whether of law or fact, as may be necessary for his defense, and which may be pertinent to the cause, but such pleas *shall* be stated in the following order and *filed at the same time:*

"1. Matters denying the jurisdiction of the court.

"2. Matters in the abatement of a suit.

"3. Matters denying the sufficiency of the complaint, or of any cause of action therein, by demurrer, general or special.

"4. Matters of counterclaim and set-off."

Observe that this Statute of Arizona, unlike the statutes in many states, expressly requires that the defendant shall state in his answer all his defenses, whether of law or fact, and that the same shall all be filed at the same time.

On the commencement of this action, when it was first before the Supreme Court of the Territory of Arizona, the plaintiffs, as required by the statutes above stated, set forth in their petition for writ of mandamus all the facts which entitled them to such writ (See the Petition, Record, p. 1).

To this petition or complaint the defendants were required to make answer, and the statute expressly provides "that the defendant in his answer may plead as many several matters, whether of law or fact, as may be necessary for his defense, and which may be pertinent to the cause, but such pleas shall be stated in the following order and filed at the same time," etc. (See full quotation above).

Therefore, this is not the case, as is erroneously urged by the learned counsel for defendants, where the defendants are required or permitted by statute first put in a demurrer to the complaint and then if demurrer be overruled, they may afterwards be permitted to answer. On the contrary, the statute requires that they must file at the same time all their defenses, "whether of law or fact."

When present case was brought originally in Supreme Court of Territory of Arizona defendants filed their answer, setting up all their defenses of law and fact, and case was heard on the merits in the Supreme Court of the Territory of Arizona, and on the former appeal in the Supreme Court of the United States, and defendants had no right, on the going down of the mandate of this Court, to make their answer over again, and set up new and additional defenses.

Not only does the statute expressly require that all defenses be stated at once, but this is exactly what the defendants did. They filed their answer January 18, 1897 (Record, pp. 6-8), in which they demurred to the petition ; that is, set up a defense of law. The defendants then also set up a further defense of fact ; namely, that these bonds had been adjudged to be invalid in the suit in which one Lewis was plaintiff and the county of Pima was defendant, etc.

If the defendants had any further defense of fact or of law whatever, they were required by the statute to make and file that defense at the same time. If, for example, they had any alleged defense, such as that the bonds had not been sold or exchanged in good faith, in compliance with the terms of the act of the legislature of February 21, 1883, by which they were authorized (which, under the act of Congress approved June 6, 1896, was one of the conditions on which they were to be funded), then such facts should have been pleaded by the defendant in its original return or answer, such facts being at that time fully known to the defendants, and were ultimately found (Rec., p. 93) and adjudged (Rec., p. 113) to show that the bonds were issued in strict compliance with said act of February 21, 1883. Full and ample opportunity was thus given by the statutes for the defendants to set up such a defense. The defendants, however, were content with their answer, and rested on it, and went to judgment on it, as stating their whole case, as the statutes required it should.

The statutes of Arizona as to mandamus (reprinted in full in the Appendix to this Brief) further provide, among other things (sections 2345, 2346, Revised Statutes of Arizona, 1887):

"2345 (SEC. 11.) If no answer be made, the case shall be heard on the papers of the applicant. If an answer be made which does not raise a question such as is mentioned in section six, but only such matters as may be explained or avoided by a reply, the court may, in its discretion, grant time for replying. *If the answer, or answer and reply, raise only questions of law, or put in issue immaterial statements not affecting the substanteal rights of the parties, the court shall proceed to hear, or fix a day for hearing, the argument of the case.*"

" 2346 (SEC. 12). *If judgment be given for the applicant*, he shall recover the damages which he shall have sustained as found by the jury, or as may be determined by the court or referees upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and *a peremptory mandate shall also be awarded without delay.*"

The defendants filed a demurrer to the facts set up in the answer of the plaintiffs, and accordingly (the facts being admitted on the record) *the answer and reply raised only questions of law*, and the court was, therefore, required, under the provisions of section 2345, above quoted, to set the case for hearing, which it accordingly did; and under section 2346, above quoted, the court was required to award "a peremptory mandate without delay." As this court decided on the former appeal, the Supreme Court of the Territory ought, *on the record thus made*, to have awarded a peremptory mandamus; and this Court sent the case back for further proceedings, *according to such decision and opinion*. This court gave no authority to the Supreme Court of the Territory to permit new answers to be filed and new defenses to be made. Obviously, there would be no end of litigation if the defendants were to be allowed to put in some new alleged defense every time a case went back "for further proceedings in accordance with this opinion" (as the mandate runs), and the plaintiff could never get a judgment.

Even if it were to be admitted (and it is not) that the Supreme Court of the Territory might have the right or discretion to permit the defendants to put in a new answer after a hearing and decision on the merits

where a case had not come on appeal to the Supreme Court of the United States, yet a different rule applies after a case has been decided by this Court. This court has many times decided that when a case has once been tried on the merits in a lower court, and the case has come before this court and been adjudicated on the merits, the defendant cannot, when the writ of mandate goes back to the lower court, set up new defenses. If the rule were otherwise, there would never be an end of litigation, for every time a case went back from this court to the lower court the defendant could ask for and obtain leave of the lower court to introduce some new defense, and thus, as the defendants have attempted to do in this case, keep the case going on perpetually with the trial of these alleged new defenses. Such is not the law of this court.

No showing was made in this case that the the facts to be newly pleaded had arisen since the first trial or had been newly discovered, although this would be immaterial as is shown by the case of *Potts, Petitioner*, and other cases in this Court, cited *infra*, p. 21.

The decision of this case by this Court on the former appeal was on the Merits. Cases in this Court cited which establish that the defendants had no right to make new defenses.

The present case stands thus :

The plaintiffs filed their petition in the Supreme Court of the Territory, alleging all the facts necessary to entitle them to a writ of mandamus. This is what

the Supreme Court of the United States expressly decided in this case *(Utter vs. Franklin*, 172 U. S., 416*)*. These facts were not controverted or put in issue by the Loan Commissioners. On the contrary, all these facts were, by the answer of the Loan Commissioners, admitted, as they were not denied. Their answer set up the affirmative defense of the decision in the case of *Lewis vs. Pima County*, 155 U. S., 54. The Supreme Court of the United States decided that the Act of Congress of June 6, 1896, made this defense unavailing, and decided that the plaintiffs are entitled to have a mandamus issued directing the Loan Commissioners to fund the bonds in question.

The merits of this case had thus been decided by the Supreme Court of the United States on appeal. The rule then applies which is stated by Mr. Justice GRAY *In Re Potts Petitioner*, 166 U. S., 263, where he said (p. 267):

"When the merits of a case have been once decided by this Court on appeal, the Circuit Court has no authority, without express leave of this Court, to grant a new trial, a rehearing or a review, **or to permit new defenses on the merits to be introduced by amendment of the answer,**" citing the cases.

In that case the plaintiffs filed a bill in equity for the infringement of a patent. The defendants put in an answer denying patentable novelty and infringement. The plaintiffs filed a general replication, and proofs were taken, and the Circuit Court sustained the defense of want of novelty, and entered a final decree dismissing the bill for want of equity. The plaintiffs appealed to the Supreme Court of the United States, which held that the letters patent were valid, and had been infringed, and therefore, as appeared by its

opinion and mandate, reversed the decree of the Circuit Court, and remanded the cause to that court for further proceedings in conformity with its opinion. The Circuit Court entered a decree in conformity with the mandate setting aside its former decree and adjudging that the letters patent were valid and had been infringed, and referred the cause to a Master to take an account of profits. Before any action was taken in the Circuit Court upon the Master's report the defendants filed a petition for a rehearing for newly-discovered evidence, and the Circuit Court granted such petition for rehearing. Thereupon the plaintiffs presented a petition to the Supreme Court of the United States for a writ of mandamus, addressed to the Judge in the Circuit Court, to command him to execute the mandate of this Court, and to set aside the order granting a rehearing, and the Supreme Court of the United States did grant the said writ of mandamus as prayed, holding and stating in its opinion that the Circuit Court had no right to entertain a petition for a rehearing, and that, under the original mandate of the Supreme Court of the United States, which reversed the decree of the Circuit Court and "*remanded the cause to that Court for further proceedings in conformity with that opinion*," the only thing which the Circuit Court had a right to do was to proceed to carry out the mandate by giving its decree and judgment in favor of the plaintiffs, and to take such further steps in the cause as were proper for that purpose, but that *it had no right to grant any new trial or rehearing.*

This decision and the language of Mr. Justice GRAY above quoted are on all fours with the present case, for on the decision of this case, *this Court granted no leave*

"to permit new defenses on the merits to be introduced by amendment to the answer."

In *Supervisors vs. Kennicott*, 94 U. S., 498, Mr. Chief Justice WAITE, giving the opinion of the Court, said (p. 498):

"When this case was here on a former appeal, we decided that the mortgage in controversy was valid in favor of *bona fide* holders of the bonds it was given to secure, and that the complainants were entitled to a decree for the amount of the bonds held by them (*Kennicott vs. Supervisors*, 16 Wall., 468, 471). These questions are, therefore, no longer open, for it is settled in this court that, *whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit.* Such subsequent appeal brings up for consideration only the proceedings of the Circuit Court after the mandate of this court (*Himely v. Rose*, 5 Cranch, 314; *Martin v. Hunter's Lessee*, 1 Wheat. 355; *Browden v. McArthur*, 12 *Id.*, 53; *Sibbard v. United States*, 12 Pet., 492; *Corning v. Troy Iron and Nail Co.*, 15 How., 466; *Sizer v. Manry*, 16 *Id.*, 103; *Roberts v. Cooper*, 20 *Id.*, 481; *Tyler v. Maguire*, 17 Wall., 283."

See, also, *Chaffin vs. Taylor*, 116 U. S., 567; s. c., on former appeal, *Chaffin vs. Taylor*, 114 U. S., 309.

So, also, in the case of *New Orleans vs. Warner*, 180 U. S., 199, this Court said, in a similar case (p. 203):

"It should be stated in this connection that no such distinction between different classes of warrants as is now made was called to the attention of this court when the case was here upon questions certified (167 U. S., 467), or upon the merits (175 U. S., 120). In fact, the present exceptions to the master's report obviously *involve an attempt to set up a new defense* as to a part of these warrants after the merits of the case have been fully considered and disposed of. This is impossible (*Yazoo, &c., R. R. Co. v. Adams, ante*, 1; *Supervisors v. Kennicott*, 94 U. S., 498").

Other pertinent cases in this Court.

Similar decisions have also been rendered in numerous other cases by the Supreme Court of the United States. For example, in *Stewart vs. Salamon*, 97 U. S., 361, the facts were that the Supreme Court had in the case of *Stewart vs. Salamon*, 94 U. S., 434, reversed the decree of the Court below and remanded the case for further proceedings in accordance with the opinion then delivered. After the mandate was filed in the Circuit Court, Stewart and Cutts petitioned for leave to file a plea of *lis pendens*, and an amended answer to the original bill. This petition was overruled, and a final decree was entered in accordance with the mandate. Whereupon Stewart and Cutts appealed to the Supreme Court of the United States; but their appeal was dismissed, the Supreme Court on this point saying (p. 362):

"This is an appeal from a decree entered upon our mandate. No complaint is made as to its form, and it seems to be in all respects according to our directions. The effort of the appellant was to open the case below, and to obtain leave to file new pleadings, introducing new defenses. This he could not do. The rights of the parties in the subject matter of the suit were finally determined upon the original appeal, and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions, and carry it into effect."

In the early case of *Ex parte Story*, 12 Pet., 339, it appears (p. 342) that in the original case the cause had been heard and the decree of the District Court reversed, and the case sent back with a mandate from the Supreme Court to the Court below directing the further proceedings to be had in that court. When the mandate went down to the Circuit Court the de-

fendant *made a motion to be permitted to introduce certain other defenses and evidence*, which motion the Circuit Court refused. Whereupon the defendant applied to the Supreme Court of the United States for a writ of mandamus to compel the Circuit Court to receive such further defenses and evidence. This writ of mandamus was refused, the Court saying (p. 343) :

"In the case now before the Court the merits of the controversy were finally decided by this court, and its mandate to the District Court required only the execution of its decree. * * * The facts stated by the defendant cannot, in this stage of the proceedings, form any defense against the execution of the mandate."

In *Gaines vs. Rugg*, 148 U. S., 228, the facts were as follows: A suit in equity had been brought by Gaines against Rugg and others concerning certain lands. Rugg filed his answer, setting up various defenses. The case was referred to a master. On his report a final decree was entered against Rugg. An appeal was taken to the Supreme Court of the United States, which "*reversed the decree and remanded the cause with a direction for further proceedings in conformity with its opinion.*" *After the mandate of this Court was presented to the Circuit Court the defendant Rugg filed in the Circuit Court his exceptions to the decree proposed by the plaintiffs*, and petitioned the Circuit Court for leave to take further testimony in support of his exceptions by way of defense to his title to the land in controversy, and the Circuit Court granted the petition. Thereupon the plaintiff Gaines petitioned the Supreme Court of the United States for a writ of mandamus requiring the Circuit Court to enter its decree in accordance with the mandate and opinion of the Supreme Court of the United States,

and the said writ of mandamus was granted. The Supreme Court said (p. 239):

"The Circuit Court had no right to empower the defendant, as it undertook to do by its order of January 7, 1893, to take further testimony in support of his exceptions by way of defense to the title to the land in controversy, or to set down the cause for hearing upon the issues formed by the pleadings and such exceptions as to the title to the land, or to sustain the exceptions, or to refuse to enter the decree proposed by the plaintiffs, or to refuse to grant to the plaintiffs a writ of possession. * * *

"It is contended for the respondent that the decree of this Court was one absolutely reversing the decree of the Circuit Court; that the Circuit Court had a right, therefore, to proceed in the case, in the language of the mandate, not merely 'in conformity with the opinion and decree of this Court,' but, also, 'according to right and justice;' and that, therefore, it had authority to permit the defendant Rugg to take further testimony in support of his exceptions, 'by way of defense to the title to the lands in controversy,' and to set down the cause 'upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands;' in other words, that the whole controversy was to be reopened as if it had never been passed upon by this court as to the title and possession of the land. This cannot be allowed, and is not in accordance with the opinion and mandate of this court."

Application of this settled doctrine of this Court to the present case.

It is obvious that the decisions in the present case in the Supreme Court of the Territory of Arizona and in the Supreme Court of the United States were decisions on the merits of the case, the same as the decisions in the cases above referred to. The plaintiffs stated in their petition for a writ of mandamus all the facts which entitle them to such writ. This was the

opinion of the Supreme Court of the United States. The defendants did not in their answer controvert or put in issue any of the facts stated in such petition, but only demurred to the petition, and set up for an affirmative defense the fact of the decision in *Lewis vs. Pima County*, claiming an estoppel by that decision. The plaintiffs demurred to this affirmative defense. The issues in the case, therefore, were perfectly defined, and by these pleadings the facts were all agreed upon between the parties, and the cause was ripe for final judgment. There was no introduction of evidence, because none were needed any more than if there had been an agreed statement of facts stipulated between the parties. The effect of the pleadings was precisely the same as if there had been such agreed statement of facts. The plaintiffs put in all their case in their petition. The defendants put in all their case in the statement of facts in their answer. This the statutes expressly require. The demurrers thus brought the *case fully before the Court on the issues of law raised upon the facts thus pleaded and agreed upon.*

The case, therefore, falls within the last paragraph of Section 2345, Arizona Revised Statutes, which says:

"If the answer or *answer and reply raise only questions of law* * * * the court shall proceed to hear or fix a date for hearing the argument of the case."

Section 2346 also applies:

"If judgment be given for the applicant, * * * a peremptory mandate shall also be awarded without delay."

The case was submitted to the Supreme Court of the Territory for final judgment, and the judgment ren-

dered by the Supreme Court of the Territory was *a final judgment on the merits*, and as such was appealable to the Supreme Court of the United States.

Riggs vs. Johnson County, 6 Wall., 166.
Davies vs. Corbin, 112 U. S., 36.

When the case came before the Supreme Court of the United States that Court had before it the same record—namely, the petition of plaintiffs stating all the facts on behalf of the plaintiffs, and the answer of the defendants, stating all the facts on behalf of the defendants.

Both parties had their day in court and an opportunity to state all their case, and on these facts as thus pleaded and agreed upon the Supreme Court of the United States rendered its opinion and decision, holding that the plaintiffs were entitled to have a writ of mandamus requiring the defendants to fund the bonds in question.

This, therefore, is a decision on the merits of the case precisely the same as in the cases above referred to. This cause is within the rule above stated by Mr. Justice GRAY (*In Re Potts, Petitioner* 166 U. S. 263, 267, stated *supra*), and supported by numerous decisions of the Supreme Court of the United States—namely :

" When the merits of a case have been once decided by this court on appeal, the Circuit Court has no authority, without express leave of this court, to grant a new trial, a rehearing or a review, *or to permit new defenses on the merits to be introduced by amendment of the answer*," citing the cases.

When this case was sent back from the Supreme Court of the United States to the Supreme Court of the Territory of Arizona with the judgment reversed,

and with directions for further proceedings not inconsistent with the opinion of the Supreme Court of the United States, the only thing for the Supreme Court of the Territory to do was to *go back to that point in the record at which the Supreme Court of the United States decided an error was committed.* The point at which the error of the Supreme Court of the Territory was committed was in its ruling on the reply made by the plaintiffs, the said reply being a demurrer to the answer made by the defendants. The Supreme Court of the Territory committed error in overruling that reply and the demurrer therein contained, and in refusing to award a mandamus as prayed in the petition of the relators. The Supreme Court of the United States so decided. The only thing for the Supreme Court of the Territory to do, therefore, was to sustain that reply and the demurrer therein contained by rendering judgment in favor of the plaintiffs. The Supreme Court of the Territory had no right to ignore this reply, and go back to a preceding pleading—namely, the answer of the defendants—and permit the defendants to amend their answer. That would not be a "*further* proceeding" in the case; but it would be an attempt on the part of the defendants to make a new case, and introduce new defenses on the merits, which the Supreme Court of the United States in numerous cases has decided cannot be done.

The rule is well settled that, when an error is committed in the trial of a cause, and the cause is sent back for further proceedings, the lower Court can only go back to the point at which the error was com-

mitted, and then the cause proceeds with the error corrected.

In this case, so proceeding from the point at which the error is corrected, the only thing for the Supreme Court of the Territory to do is to render judgment for the plaintiffs.

Furthermore, the statutes of the Territory of Arizona provide a complete code as to mandamus proceedings, and they do not provide or attempt to provide for any new trial or any amendment to the answer of the defendants in a case like the present.

The only provision for a new trial provided by the Code as to mandamus proceedings is where the cause has once been tried by a jury. But where the case has, as in this case, been tried by the Court without a jury (that is, upon the facts agreed to in the pleadings of the plaintiffs and the defendants), no new trial is authorized or permitted.

Further decisions of this Court squarely in support of Point I. *(supra*, p. 11*).*

But, even if the statutes of Arizona permit a second trial and the making of a new case by the defendants in their answer, this rule would not apply after the case has gone to the Supreme Court of the United States on the merits, and a decision has been had on the merits in that court.

This proposition has been expressly decided by the Supreme Court of the United States in the case of *Ex Parte Dubuque*, 1 Wall., 69. The Code of Iowa provided that, after a trial in ejectment and verdict and judg-

ment for one of the parties, there might, in the discretion of the Court, *be a second trial, notwithstanding the first trial, verdict and judgment.* A case in ejectment was tried and verdict rendered and judgment entered, and the case went to the Supreme Court of the United States, where the judgment was reversed on the merits, and the case sent back for further proceedings. There was an attempt made by one of the parties to have a second trial. The Supreme Court of the United States, while admitting that such a trial might have been had ordinarily under the provisions of the Code of Iowa above mentioned, distinctly held that, where the case had once gone to the Supreme Court of the United States on the merits and a decision rendered therein, no new or second trial could be had, even under the provisions of the Code of Iowa expressly granting such new or second trial in ordinary cases. The United States Supreme Court said *(Ex parte Dubuque*, 1 Wall., 69, 73*)*:

"In granting the new trial the District Court seems to have been governed by two reasons: First, because the statutes of Iowa prescribed that a second trial may be had of course in actions brought for the recovery of real estate; and, secondly, because the court below had the power, after the cause was presented there by a mandate from this court and the judgment of reversal entered, to hold that the cause stood on the same footing that it would have done had the District Court entered the judgment for the defendant before the cause was brought up to this court. And in that case it is true the District Court could have granted a new trial at its discretion * * * The District Court had no power to set aside the judgment of the Supreme Court, its authority extending only to executing the mandate.

"We order that a writ of mandamus do issue to the Circuit Court of the District of Iowa commanding it to vacate and erase the order granting a new trial in the aforesaid cause, and that a judgment be entered in conformity to the mandate of this court."

Therefore, we say that, even if the Code of Arizona had permitted a second trial in a mandamus proceeding where the case was tried, as this one was, before a Judge and without a jury, yet, under this decision of the Supreme Court of the United States, no new or second trial could be had or new defenses introduced in the present case, *since this case has gone to the Supreme Court of the United States and been decided there on the merits*, and the judgment reversed and the case sent back for further proceedings in accordance with its opinion. But, as we have above shown, the Code of Arizona, with respect to mandamus proceedings, does not authorize or permit any second trial in a case which is tried on issues of law before a Judge and without a jury.

It specifies the only case in which a new trial is permitted in mandamus proceedings—namely, where a case is tried before a jury, and this specification permitting a new trial in such a case amounts to a prohibition of a new trial in all other cases, if such prohibition were needed, under the well-known maxim *expressio unius est exclusio alterius*. Of course, no such prohibition is needed, since no new trial can be had, and no amendments made, and no new defenses put in unless the statute expressly authorizes this to be done.

Answer to contention of the Defendants,

In the brief filed in the Court below by counsel for the loan commissioners, they quoted certain provisions of the Revised Statutes of Arizona—to wit, paragraphs 667, 673 and 758—as to amending pleadings in ordinary actions. These paragraphs clearly have no applica-

to a special proceeding where there is a separate and complete code of procedure prescribed, such as the mandamus proceeding, as to which the Revised Statutes of Arizona provide a complete code of procedure.

Moreover, these provisions permitting amendments would have no application in a case like the present, where the case has been tried on the merits and a decision rendered by the Supreme Court of the United States on the merits, as we have above shown. The learned counsel for the loan commissioners were in error in stating on their said brief that the "present stage of the action is simply that a demurrer to the writ has been overruled, and it is now open to the respondents to answer to the merits and have the issues of fact tried as provided by law." The facts are that the defendants *did answer on the merits* (and they were by the statutes of Arizona expressly required to put in *all their defenses of law and fact in the one pleading*), and that the plaintiffs in their reply demurred to such answer, and this demurrer was wrongfully overruled by the Supreme Court of the Territory, and the Supreme Court of the United States has decided that the demurrer should be sustained, and it is impossible for the defendants to go back of that demurrer and amend a preceding pleading; namely, the defendant's answer.

The learned counsel for the Loan Commissioners on their said brief referred to the case of *In re Sanford Fork and Tool Company*, 160 U. S., 247. An examination of that case will readily show to this Court that the decision of the Supreme Court of the United

States therein is in exact accordance with the other decisions of the Court and with the principles here stated; namely, when a case goes to the Supreme Court of the United States it decides where the lower Court first committed error, and that, when the judgment is reversed and the case remanded for further proceedings, *the trial Court goes back to that point in the case at which the error was committed, and proceeds from that point.* In that case the plaintiffs filed exceptions to the answer, which exceptions were sustained by the Circuit Court, and decree thereupon rendered in favor of the plaintiffs. The Supreme Court of the United States says (*In re Sanford Fork and Tool Company*, 160 U. S., 247, 257, 258):

"When a case in equity is set down for hearing on bill and answer, the whole case is presented for final decree in favor of either party. *But when the matter set down for hearing is the plaintiff's exceptions to the answer, the case is not ripe for a final decree.* * * * The Circuit Court, upon sustaining the exceptions, could not * * * enter a final decree against the defendants."

The Supreme Court, therefore, held that, when that Court had reversed the judgment of the lower Court, which judgment sustained the exceptions to the answer, and had sent the case back to the lower Court for further proceedings, the lower Court should begin where the error was committed—namely, the exceptions to the answer should be overruled, and the cause should thereupon proceed from that point.

That decision is exactly in accordance with what we maintain in the present case. **Our cause was ripe for final decree** under the procedure prescribed by the statutes of the Territory of Arizona, Section 2345, above quoted, which provides:

"If the answer, or answer and reply, raise only questions of law * * * the court shall proceed to hear or fix a date for hearing the argument of the case."

Section 2346:

"If judgment be given for the applicant * * * a peremptory mandate shall also be awarded without delay."

This case is, therefore, within the language of Mr. Justice GRAY above quoted from the opinion in *Sanford Fork and Tool Company, supra*, where he says:

"When a case in equity is set down for hearing on bill and answer, the whole case is presented for final decree in favor of either party."

That, under the practice in equity, is like the present case, where the plaintiffs stated their facts in their petition, the defendants stated their facts in their answer, and the plaintiffs in their reply demurred to the defendants' answer, and the whole case was thus presented for final decree on the issues of law under the practice prescribed by the Code of Arizona, Sections 2345 and 2346, quoted *(supra*, pp. 18–19*)*.

This court in the case of *In re Sanford Fork & Tool Company, supra*, expressly distinguishes that case from the cases above cited by us, Mr. Justice GRAY saying (p. 259):

"The case is quite different in this respect from those in which *the whole case*, or all but a subsidiary question of accounting, had been brought to and decided by this court upon the appeal as in the cases principally relied on by the petitioner *(Stewart v. Salamon*, 94 U. S., 434, and 97 U. S., 361; *Gaines v. Rugg*, 148 U. S., 228; *Ex Parte Dubuque & Pacific Railroad*, 1 Wall., 69; *In re Washington & Georgetown Railroad*, 140 U. S., 91*)*.

"It must be remembered, however, that *no question once considered and decided by this court can be reexamined at any subsequent stage of the same case.*"

The learned counsel for the Loan Commissioners on their brief filed in the court below also referred to certain cases (*Stewart vs. Salamon*, 97 U. S., 361, and others), saying with regard to those cases that "all had been heard on their merits; that is, on the facts." That is true of the present case.

It would be a strange and novel doctrine for any court to hold that the case could not be heard on the merits, both in a court of original jurisdiction and on appeal, and a decision rendered on the facts where the parties had agreed by their pleadings to the facts, as well as where the parties had by their pleadings disputed the facts and the facts had been found on trial of issues of fact.

The very purpose of pleadings is to enable the parties to agree upon the facts if possible, and thus present the case to the Court upon the facts so agreed upon. A case thus tried is just as much tried upon the merits and is just as conclusive as if the parties had by their pleadings disputed the facts and left them to be found by the Court. It is just as much a trial upon the merits where the facts are thus agreed upon in the complaint and answer and demurrer to answer, as in the present case, as if the parties had made a stipulation agreeing that the facts contained in the said complaint and in the said answer were true. That is the legal and actual effect of the pleadings. In all of the cases cited on our brief *supra* it was urgud by the defendant that there had not been a trial upon *all*

the facts, and the attempt in each case was for the defendant to set up some new fact that had not been brought forward in the original answer and in the original trial. That is precisely what the defendants in this case were permitted to do. They say that the case has not been heard upon *all* the facts. They want to bring in some more facts. They cannot do it in this case any more than the defendants could do it in the cases above cited, and for the very same reasons; they have had their day in court, and an opportunity to answer as well as the duty fully on the merits.

A party to a cause is not permitted to put forward a part of the facts in his answer, and then wait until the case is decided on its merits against him on such answer and state that he has in reserve certain other facts which he did not put in his answer, and which he now asks an opportunity to put in. This operation if permitted might be repeated by the defendants in a case from time to time for an indefinite period, and no result be ever arrived at in the litigation. The rules of law and the decisions of the Supreme Court of the United States do not permit any such course. There would never be an end of litigation if such a course were permitted.

In the case of *Ex parte Story*, 12 Pet., 339, above referred to, the Court says (p. 343):

"The facts stated by the defendant can not, in this stage of the proceedings, form any defense against the execution of the mandate."

This implies that the facts, if properly pleaded originally at the proper time, might have formed some defense to the action—that is, the decision of the Court

in that case was that such new defenses and new facts could not be introduced after the case had been heard upon the merits, whatever might be the pertinency or relevancy of such facts if they had been originally pleaded.

In fact, that is the very point of all the cases—there has been a struggle to have a new trial, to introduce new issues, after the Supreme Court of the United States had decided on the rights of the parties to the case as they had made them on the record. See the language of the Supreme Court of the United States in the case of *Ex Parte Story*, 12 Pet., 339, above quoted:

"The facts stated by the defendant cannot, *in this stage of the proceedings*, form any defense against the execution of the mandate."

The exact case made by the record on the former appeal, and the effect of the judgment of this Court.

If a careful study is made of the record of the present case in the Supreme Court of the United States on the former Appeal, it will appear that by the petition and Exhibit A thereto attached and made a part thereof the plaintiffs allege:

(*a*) That the bonds held by them were issued by virtue of the authority of the Act of February 21, 1883.

(*b*) A copy of the bond of the County of Pima is set out, by which it appears that it is negotiable; and each bond recites that it is "issued by the board of supervisors of said county of Pima under and by virtue of the act of the legislature, entitled" (giving the title

of the Act of February 21, 1883). It also recites that "this bond is one of a series of 200, issued in pursuance of said act and exchanged for a like number of bonds of the railroad company of like amounts, bearing like interest, and running for a like time as the bonds of which this is one." Observe that this recital is that the bond is issued "*under and by virture of* the act of Feb. 21, 1883." As to the effect of this recital on the rights of the holder of the bond as against the county see the case of *Evansville vs. Dennett*, 161 U. S., 434, and *Gunnison County vs. Rollins*, 173 U. S., 255. The bond also specifically recites that it is issued in pursuance of the said Act of February 21, 1883, and exchanged for a like number of bonds of the said railroad company of like amounts, &c.; in short, reciting the requisites under the said Act of February 21, 1883, of the right of the said railroad company to demand and receive said county bonds in exchange for its own first mortgage bonds. The bond also recites that this exchange has been made *under and in pursuance of* the terms of the Act of February 21, 1883. The bond containing this recital is signed by the Chairman and Clerk of the Board of Supervisors and by the County Recorder, and is attested by the seal of the county. Under the decisions of the Supreme Court of the United States, this is a determination by the county authorities, who are the tribunal authorized to make the determination, that the facts there recited are true, and that all the conditions required by the Act of February 21, 1883, for a lawful exchange of bonds, have been met and complied with.

The petition of the relators, after setting out the bond, alleges in point of fact (Record, p. 2) that the county delivered these bonds "with the coupons

attached to the Narrow Gauge Railroad Company, as provided for in the said Act of February 21, 1883, *in exchange* for a like number and denomination of the bonds of the company with like coupons thereto attached." It then alleges a sale of the said bonds by the railroad company in the open market, in good faith, for a valuable consideration, and their purchase by the plaintiffs in good faith and for a valuable consideration. The plaintiffs then allege the demand for the funding and the refusal as set forth in Exhibit A attached to the petition.

To the petition containing this statement of facts the defendants were required by express statute of Arizona to make their answer, setting forth in one pleading *all their defenses of law and fact.* In considering that answer the defendants found that there was not a single *fact* stated in the petition or recited in the bond or in Exhibit A attached to the petition which they could deny in point of fact, and therefore they demurred to the same. The defendants had, however, one *fact* on which they relied, which did not appear on the face of the petition and Exhibit A thereto attached, and that fact was that the county had been sued by one Lewis on the coupons on these very bonds, and that such proceedings were had in the said cause as that by the judgment of the Territorial Supreme Court and, on appeal, by the judgment of the Supreme Court of the United States, the said bonds were declared to be void, and the defendants set up this adjudication in the second division of the answer as a defense to the relief sought by the petitioners, *and they set up no other defense on the facts.* The "facts" stated in this defense—namely, that such a suit had been brought by Lewis against Pima County, and that the result of that suit

was as stated in the second division of the answer—the petitioners could not contest, and therefore they demurred to the same.

The effect of all this was that the defendants said, "On the face of this record we admit every fact that the plaintiffs state as to those bonds;" and the plaintiffs say, "We admit every fact stated in the second defense pleaded in the answer;" and they say in effect by the demurrer: "What of it?" The case is then submitted to the Court for its judgment upon the legal rights of the parties on the agreement reached by the pleadings that every material fact stated in the petition and Exhibit A is true, and that every material fact stated in the second defense of the answer is true, and they ask the judgment of the Court whether, if these facts are thus true, the plaintiffs are entitled to the mandamus which they seek. The legal effect of what was done is just precisely the same as if the two parties to this record had signed an agreed statement of facts as follows, to wit:

It is agreed that all the facts stated in the plaintiffs' petition are true; it is also agreed that all the facts stated in the defendants' answer are true; and we thereupon submit to the Court the question thereon arising whether the plaintiffs are or are not entitled to the writ of mandamus, and judgment may go according as the Court may decide this question.

This was the record as the parties made it, and it went to the Supreme Court of the United States, and that Court held that on these facts the plaintiffs were entitled to have their bonds funded, and that the mandamus ought to have been issued, and ordered the cause remanded accordingly, without any right being given to amend the pleadings and to make a new case and have a new trial. On this record

the defendants had no right, on the going down of the mandate of this Court, to amend pleadings, make a new case and new defenses, introduce new evidence, have a new trial, and reopen the whole matter anew as if there had never been any case at trial. If they could get leave to amend and introduce a new defense, there would be no end to litigation. We wish to repeat that this is precisely what the Supreme Court holds, in the cases above cited in our brief, cannot be done. There must be an end to litigation some time; and, when both parties have had a full and free opportunity to put in their claims and defenses, and the case has had a decision on the merits as they deliberately made it, the defeated parties cannot go back again and from time to time raise such new defenses as they may think possibly will help their case.

Questions before this Court on former appeal.

This ought to end the discussion, but we call attention also to the fact that the counsel for the county, as well as the Supreme Court, understood the case as we have here presented it, and this is perfectly manifest from the brief of Mr. C. W. Wright in this case on the former appeal for the appellee in the case of *Utter vs. Franklin*, the former appeal, and from the opinion of the Supreme Court of the United States. The county in that brief claimed substantially three things:

First. That these bonds were not within the language of the Act of Congress of June 6, 1896, and that they were not "outstanding bonds" within the

meaning of that act, for the reason that it could not be said, as counsel contended, that these bonds were "outstanding," when they had, before that time, been solemnly held by the Supreme Court of the United States not to be valid. This position is answered by the Supreme Court of the United States in the opinion in *Utter vs. Franklin*, 172 U. S., at page 423.

SECOND. The county also made the point that it was not in the power of Congress to validate bonds which had been held void by the Supreme Court of the United States. The Supreme Court of the United States overruled this point as will be seen by its language on pages 423 and 424.

THIRD. And the county also made the point that, under the funding legislation, the petitioners had no right to have the bonds funded, because there had been *no official demand* by the county authorities therefor. The Supreme Court of the United States overruled *this* point, and, referring to the legislation, Territorial and Congressional, on the subject, and particularly to the Act of Congress of June 6, 1896, said:

"Construing this [to wit, the Act of Congress of June 6, 1896] in the light of surrounding circumstances, and, particularly, in view of the memorial, it is entirely clear that it was intended to apply to bonds issued under authority of the legislature, and purporting on their face to be legal obligations of the county, whether in fact legal or not; and, to put the matter still further beyond question, they are expressly declared to be legal and valid."

That was said in this very case with reference to these very bonds, and is the judgment of the Court as to the effect of the Act of June 6, 1896, upon these bonds.

As to this point that there was no official demand, the Supreme Court says that it is not well taken, because the Territorial Act of March 19, 1891, does not require any such demand, nor does the Act of Congress of June 6, 1896. With reference to this act the Supreme Court of the United States says (p. 425):

"The act of Congress of June 6, 1896, declared that all the outstanding bonds, warrants and other evidences of indebtedness of the Territory and its municipalities *shall* be funded with the interests thereon," etc. (The court italicized the word *shall*.) And the opinion concludes: "We are, therefore, of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question, and that the order of the Supreme Court of the Territory must be reversed, and the case remanded to that court for further proceedings not inconsistent with the opinion of this court."

What can be more inconsistent with the opinion of the Supreme Court that it was made the duty of the Loan Commissioners by these acts to fund the bonds in question than for the Territorial Court now to say: "Why, you need not perform that duty, and we will go on and make an investigation to see whether you ever ought to perform it."

The Supreme Court of the United States regarded this record in precisely the same light as we are here presenting it—namely, that the facts had all been agreed to on behalf of the petitioners and on behalf of the Loan Commissioners, and that the whole case was submitted to the Territorial Court on the merits, and afterwards came before the Supreme Court of the United States on the merits. For these reasons, the Supreme Court of the United States, in rendering its decision, does not undertake to send the case back for a new trial, nor does it send the case back to per-

mit any new issues to be raised. The facts had all been agreed upon, and there was no occasion for doing any such thing. On the contrary, the Supreme Court of the United States says: **"We are, therefore, of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question."** Here is the decision of the Supreme Court of the United States on the merits on a record before them, and no suggestion is made by them and no permission granted by them for a new trial, or any amendments of the pleadings, and the only thing to be done is to take such further proceedings in the Supreme Court of the Territory as will give effect to the decision of the Supreme Court of the United States, and no effect can be given to that decision unless the duty there declared to fund these bonds is performed by the defendants. The Supreme Court of the Territory should merely have gone back to the point at which it made its error in holding on the record that the plaintiffs were not entitled to have their bonds funded. Taking up the case at that point, the Territorial court should then have entered its judgment order obediently to the judgment of the Supreme Court of the United States, that the plaintiffs are entitled to have their bonds funded and ordering the defendants to fund them, and accordingly give effect to the decision and judgment of the Supreme Court of the United States.

Meaning and effect of a remanding for "further proceedings."

It would not accord with the practice of the Supreme Court of the United States for it to issue its mandate

direct to the Loan Commissioners to fund these bonds, and, according to the practice of the Court, it sent the case back to the lower Court to have it issue the necessary mandamus. That is what is meant by the mandate, "to take further proceedings not inconsistent with the opinion of this Court." In other words, the Supreme Court of the Territory was to bring the case to a conclusion by rendering, without any further trial, the judgment which the Supreme Court of the United States has decided must be rendered and which the plaintiffs are entitled to have rendered. The words "further proceedings" do not mean the opening up of the case anew or granting a new trial or new defenses or any such thing, as is shown by all the cases cited on our brief, but they mean only additional proceedings commencing where the error was committed.

If, therefore, the defendants wished to have the pleadings amended and a retrial they should have asked the Supreme Court of the United States in remanding the case to make provision to this end; or, after the decision of the Supreme Court of the United States, should have filed a petition for a rehearing and asked the Court to have its judgment modified so that when the case was remanded to the Territorial Court the defendants might file additional pleas and have a new trial.

A moment's reflection will show that, if any other rule were adopted, and if it were possible for a defeated party, after having a decision rendered on the merits of the case, to go back and begin the case all over again, introduce new defenses, new testimony, have a new trial, and make the case as if it had never been decided, then there would be no end of litigation.

In the questions above considered there is no difference in the interpretation and effect to be given to the decision and mandate of the Supreme Court of the United States when rendered as respects a decision of the Supreme Court of a Territory from what there is when rendered as respects a decision of a Circuit Court of the United States.

Section 702 of the Revised Statutes of the United States provides as follows:

"The final judgments and decrees of the supreme court of any Territory. * * * may be reviewed and reversed or affirmed in the Supreme Court upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a circuit court."

The Supreme Court of the United States in sending down its formal mandate, whether it reverses the judgment or whether it affirms the judgment, always remands the cause "*for further proceedings.*" This is the usual formal ending of the mandate whether a judgment be reversed or whether it be affirmed. But, unless it be expressed elsewhere in the body of the mandate that there is to be a new trial permitted or the case otherwise opened up from the beginning, the words mean only that there shall be further proceedings only from the point where in case of reversal the lower court committed its error, or in case of affirmance where the lower court entered its judgment, the further proceedings mean the issuance of execution, &c., &c.

Blake vs. McClung, 176 U. S., 59, and *Blake vs. McClung*, 172 U. S., 239, is a case in point, where the mandate was, as usual, "*for further proceedings not inconsistent with this opinion.*"

When that case was first before the Supreme Court of the United States it came there on writ of error to the Supreme Court of the State of Tennessee, bringing up for review a final judgment sustaining the validity of a statute of the State of Tennessee, which, as construed by the Supreme Court of the State of Tennessee, undertook to give to the residents of that state a priority in the distribution of assets over creditors who were residents of any other state. The Supreme Court of the United States decided and stated in its opinion that such preference was invalid as against individual persons, citizens of the State of Ohio, and concluded its opinion as follows (p. 262) :

" As to the other plaintiffs in error, citizens of Ohio, the judgment must be reversed, and *the cause remanded for further proceedings not inconsistent with this opinion ;* and it is so ordered."

After such decision by this court the case was again heard by the Supreme Court of Tennessee, on motion of Blake and others for a decree in conformity with the opinion and mandate of this court (see 176 U. S., 59, 65). The Supreme Court of Tennessee entered a decree which was not in conformity with the opinion of the Supreme Court of the United States. Thereupon Blake sued out a writ of error to the Supreme Court of the United States a second time, and this court, after repeating what was stated in its former opinion, and on the basis of such former opinion, again reversed the case and remanded it for further proceedings in accordance with its former opinion. This court said (p. 67) :

" We are constrained to hold that the judgment of the Supreme Court of Tennessee is *not in conformity with the opinion and mandate* of this court. *The*

thought expressed in our former opinion was," &c. * * * (p. 68): "It is not within the province of this court to prescribe the form of a decree to be entered for the distribution of the assets in question. But it is both its province and duty to adjudge, in accordance with the supreme law of the land, as we now do, that the plaintiffs in error, citizens of Ohio, are entitled to share in the distribution of the assets of this insolvent corporation upon terms of equality, in all respects, with like creditors who are citizens of Tennessee."

In that case of *Blake vs. McClung*, just as in the present case, this court had plainly *pointed out in its opinion on the first writ of error what the lower court ought to do.* The lower court, in the Tennessee case, had disregarded the opinion and mandate of this court, and on writ of error this court again reversed the judgment and remanded the cause for further proceedings consistent with its opinion. So in our present case, on the former appeal this court *said that the bonds in question must be funded*, and reversed the judgment for further proceedings *in accordance with its opinion.*

For the foregoing reasons the only thing for the Supreme Court of the Territory of Arizona to do when it received the *opinion and mandate* of this court was to enter a judgment immediately in accordance with such opinion and mandate, and not to permit new defenses to be introduced and to consider whether on such new defenses a judgment ought or ought not to be entered directing the funding of the bonds. This court in its opinion had said the bonds must be funded, and that ended the matter.

The *right* of the testators to have their bonds refunded was the very right which was contested in the former appeal, and the relators' said *right* was adjudged and established by this Court.

Therefore, the judgment finally entered by the Supreme Court of the Territory directing the funding of the bonds is correct, and should be affirmed, without regard to the new defenses and matters which were *intruded* into the case between the issuance of the mandate of this court and the entry of such judgment.

II.

The Findings of Fact by the Supreme Court of the Territory of Arizona show that the $150,000 bonds of Pima county involved in this case were, within the language of the act of Congress approved June 6, 1896, "sold or exchanged in good faith, in compliance with the terms of the act of the legislature [to wit, the act approved February 21, 1883], by which they were authorized."

Of course on this appeal the Findings of Fact of the Supreme Court of the Territory of Arizona are conclusive as to the facts.

Holloway vs. Dunham, 170 U. S., 615.
Marshall vs. Burtis, 172 U. S., 630, 634–635.

In order to show to this court that these Findings of Fact by the Supreme Court of Arizona established conclusively that these bonds were sold or exchanged in good faith, in compliance with the terms of the act of the legislature by which they were authorized, we have placed below, in parallel columns, the requirements of the act of February 21, 1883, and the corresponding Findings of Fact by the Supreme Court of the Territory.

"SECTION 1. Upon information in writing to the Chairman of the Board of Supervisors of the Pima County, Arizona Territory, by the President of the Arizona Narrow Gauge Railroad Company, the corporation of that name, which filed its articles of association with the Secretary of said Territory, on the 23d day of November, A. D. 1882, that said railroad company is ready to exchange bonds with the said County of Pima, according to the provisions of this Act, it shall be the duty of said Chairman, and he is hereby directed, to call a meeting of said Board, to be held within five days after the receipt of said notification, and it shall be the duty of said Board of Supervisors, and they are hereby directed, to meet within five days at the county seat of said county, and then and there to order issued two hundred thousand dollars of bonds

[Findings of Fact, No. I., Record, p. 91.]

"That the Arizona Narrow Gauge Railroad Company, mentioned in the act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad,' filed its articles of association with the secretary of the said Territory on the 23rd day of November, 1882," &c.

[Findings of Fact, No. II., Record, p. 95.]

"That the president of the Arizona Narrow Gauge Railroad Company mentioned in the act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad,' on April 27, 1883, gave information in writing to the chairman of the board of supervisors of Pima

of said County, in denominations of one thousand dollars each, and bearing interest at the rate of seven per cent. per annum, interest payable semi-annually, the principal payable in twenty years, which said bonds, and the interest coupons thereto attached, shall be signed by said Chairman and the Clerk of said Board, and shall, within thirty days after the said order of issuance thereof has been made, be delivered by the Clerk of said Board to the County Treasurer of said County of Pima, to be by him disposed of as hereinafter provided, and said County Treasurer shall receipt to the said Clerk for the said bonds."

county, Territory of Arizona, that the said railroad company was ready to exchange bonds with the said county of Pima according to the provision of the said act approved February 21, 1883."

[Findings of Fact, No. III., Record, p. 95.]

"That upon such information in writing being given to the chairman of the board of supervisors of Pima county, Territory of Arizona, by the president of the Arizona Narrow Gauge Railroad Company, the corporation of that name which filed its articles of association with the secretary of the said Territory on the 23d day of November, 1882, that the said railroad company was ready to exchange bonds with the said county of Pima, according to the provisions of the said act approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad,' the said chairman of the said board of supervisors called a meeting of the said board to be held within five days after the receipt of the said notification, namely, to be held at the office of the said board at the court-house on Monday, the 30th day of April, 1883, at ten o'clock a. m., to take action on said notice and application."

[Findings of Fact, No. IV., Record, p. 95.]

"That the board of supervisors of the county of Pima, Territory of Arizona, met at their office in the court-house at the county seat of said county on Monday, April 30, 1883, at ten o'clock a. m., pursuant to the call by the chairman of the said board issued April 27, 1883, made as prescribed in section 1 of the act of the legislature of the Territory of Arizona approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad,' to consider the application of W. H. Culver, president of the Arizona Narrow Gauge Railroad Company, for an exchange of bonds in accordance with the provisions of the said act. That the said board adjourned from time to time until May 5, 1883, on which day the following proceedings were had, as appears by the minute entries of the said board; 'The board resumed the consideration of the application of the Narrow Gauge Railroad Company for exchange of bonds. After argument for and against the proposition, Supervisor Toole offered the following: Ordered, that the board, having

duly considered the application of the Narrow Gauge Railroad Company for an exchange of $200,000 of bonds, and being of the opinion that the said railroad company is not in position to give any guarantee that they intend in good faith to build said road ; it is ordered that until said company do some act in accordance with the provisions of the law under which they ask an exchange of bonds, their application be refused and denied. The motion not being seconded was not entertained. Supervisor Samaniego presented for the consideration of the board the following order : ' Ordered, $200,000 of the bonds of the county of Pima drawn in accordance with an act of the Legislative Assembly of the Territory of Arizona, entitled " An act to promote the construction of a certain railroad," approved the 21st day of February, A. D. 1883, be issued and that the same be placed in the hands of the county treasurer upon the Narrow Gauge Railroad Company giving bonds to the county of Pima in the sum of five hundred dollars, conditioned that if the above bonds are not exchanged in accordance with the provisions of said act for the bonds of

the above-named railroad, that said company will repay the said county of Pima all expenses incurred in the issuance of said bonds; the bond to be approved by the board after submission to the district attorney as to form. The question being upon the adoption of the order, those voting the affirmative were Supervisors Otis and Samaniego; those voting the negative, Supervisor Toole. So the motion passed and was adopted.' That on May 19, 1883, the said board of supervisors of the county of Pima ordered that the clerk be instructed to prepare forms of bonds to be ready for the inspection of the board on May 21, 1883. That on May 21, 1883, the records of the board of supervisors of said county show that the clerk submitted forms of such bonds and that the said board ordered them to be lithographed. That on August 2, 1883, the said board made the following order, to wit: 'In the matter of exchange of bonds with the Arizona Narrow Gauge Railroad Company; ordered that the respective county officers required by law so to do, sign and seal said bonds, and thereupon the clerk of the board is especially instructed to de-

liver said bonds to the county treasurer, taking his receipt therefor.' That there was filed with the clerk of said board August 3, 1883, over the signature of W. J. Osborne, clerk, and signed J. C. McElliot, county treasurer, the following: 'Tucson, A. T., August 18, 1883. Received of William J. Osborne, clerk of the board of supervisors of the county of Pima, two hundred (200) bonds of one thousand (1,000) dollars each, numbered from one to two hundred inclusive, of the county of Pima, for issue to the Narrow Gauge Railroad Company of Arizona, as provided by law.' That said bonds and coupons embraced bonds numbers one to one hundred and fifty inclusive, and the coupons thereon described in the petition in these mandamus proceedings."

The bonds involved in these mandamus proceedings conform to this Section 3 (see form of bond described in the petition, Record, p. 1). The finding of the court is as follows (Finding IV., Record, p. 96, near bottom of page):

"That said bonds and coupons embraced bonds numbers one to one hundred and fifty inclusive, and the coupons thereon described in the petition in these mandamus proceedings."

[Findings of Fact, No. VI., Record, p. 98.]

"SEC. 2. Upon the application of said railroad company to the said Treasurer, and the tender by said company of fifty thousand dollars of the first mortgage bonds of said company in like denominations, bearing like interest and payable in like time as those of said County, it shall be the duty of said Treasurer, and he is hereby directed to deliver fifty thousand dollars of bonds of said county to the President and Secretary of said railroad company, in exchange for fifty thousand dollars of the first mortgage bonds of said railroad company, so tendered as above provided. And whenever, and so often as each five miles of said railroad shall have been graded, laid with ties and iron, said Treasurer shall upon proof thereof, which proof shall be the certificate of the County Surveyor to that effect, exchange with the said President and Secretary of said railroad com-

"That afterwards, to wit, on or about August 13, 1886, the treasurer of the said county of Pima upon proof of the fact that five miles of said railroad mentioned in the said act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad,' had been graded, laid with ties and iron, which proof was the certificate of the county surveyor to that effect, exchanged with the said president and with the said secretary of the said Arizona Narrow Gauge Railroad Company $50,000 of said bonds of the said county of Pima, for $50,000 of the said first-mortgage bonds of the said Arizona Narrow Gauge Railroad Company, the said bonds of the county of Pima being numbers 51 to 100 inclusive, and being part of the bonds described in the petition in these mandamus proceedings. It is further found as a matter

pany fifty thousand dollars of said bonds of said Pima county for fifty thousand dollars of said bonds of said company, for each five miles so completed, until the two hundred thousand dollars of bonds of said Pima County are exchanged for a like number of bonds of said railroad company."

of fact that at the time the said $50,000 of said Pima County bonds were thus delivered by the treasurer of said county, at least five miles of the said Arizona Narrow Gauge railroad had been graded, laid with ties and iron and constructed as required by the said act approved February 21, 1883."

[Findings of Fact, No. VII., Record, p. 98.]

"That afterwards, to wit, on or about August 13, 1886, the treasurer of the county of Pima upon proof of the fact that a second and additional five miles of the said Arizona Narrow Gauge railroad had been graded and laid with ties and iron, which proof was the certificate of the county surveyor to that effect, exchanged with the president and secretary of the said Arizona Narrow Gauge Railroad Company $50,000 bonds of the county of Pima, numbers 101 to 150 inclusive, for $50,000 of the first mortgage bonds of the said Arizona Narrow Gauge Railroad Company, the said $50,000 bonds of the county of Pima being part of the bonds described in the petition in these mandamus proceedings. It is further found as a matter of fact that at the time the said third $50,000 of

said Pima County bonds were thus delivered by the treasurer of said county, at least ten miles of the said Arizona Narrow Gauge Railroad had been graded, laid with ties and iron and constructed as required by the said act approved February 21, 1883."

In Finding V. (Record, p. 97), the Supreme Court of the Territory says that "there is no evidence in the records of the Board of Supervisors or the office of the treasurer of said Pima county how the first $50,000 of bonds [numbers 1 to 50, inclusive] came into the possession of the Arizona Narrow Gauge Railroad Company." The Court, however, in Finding IV. (Record, pp. 95, 96), above quoted, found that all the bonds numbers 1 to 150, inclusive, were delivered to the treasurer of the county and his receipt taken therefor. This was exactly in accordance with section one of the act of February 21, 1883. It

then became the duty of the treasurer of the county, and of him alone, under the express provisions of said act of February 21, 1883, to deliver these $50,000 bonds to the Arizona Narrow Gauge Railroad Company in exchange for a like amount of first mortgage bonds of that company. This duty was one that devolved upon the treasurer alone, and one which might have been enforced by mandamus. The Board of Supervisors of the county had, under the act of February 21, 1883, nothing to do with the bonds after they were delivered to the treasurer, and no record was required to be made, either in the office of the supervisors or in the office of the treasurer, of the time when such exchange of bonds for first mortgage bonds of the railroad company was made, or of the fact of such delivery.

The records of the Board of Supervisors of the county, mentioned in the latter part of Finding IV., show that these $50,000 bonds of the county had been delivered to the Arizona Narrow Gauge Railroad Company on or prior to June 16, 1884. Finding XII. (Record, p. 109), also expressly states that the first mortgage bonds of the Arizona Narrow Gauge Railroad Company, amounting to $150,000, were in all respects "made, issued and *delivered* in full conformity to all the provisions of the said act of the Legislature of the Territory of Arizona, approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad.'" One provision of the said act was that they should be delivered in exchange for a like amount of bonds of the county.

It matters not, there-

fore, that there is nothing in the *records* of the Board of Supervisors or office of the treasurer of Pima county to show how or when the first $50,000 bonds came into the possession of the Arizona Narrow Gauge Railroad Company. That company was entitled, under the act of February 21, 1883, to have these bonds on the delivery of a like amount of first mortgage bonds of the company, and there is a finding that such first mortgage bonds were delivered in accordance with the act of February 21, 1883.

"SEC. 5. The bonds of said railroad company, hereinbefore provided for to be tendered and exchanged for the bonds of Pima County shall be secured by a deed of trust or mortgage to at least two trustees, of all the property, real and personal owned by said railroad company, at the time of the issuance of said bonds, or that may thereafter be acquired, including, also, all franchises and priv-

[Findings of Fact, No. XII., Record, p. 109.]

"That the said first-mortgage bonds of the said Arizona Narrow Gauge Railroad Company which were exchanged for the $150,000 bonds of Pima county were duly made and executed by the said company, were secured by deed of trust or mortgage to at least two trustees of all the property, real and personal, owned by said railroad at

ileges of whatsoever kind or nature, and which said deed of trust or mortgage shall be the first made of or on said property, and said bonds of said company shall be issued in the name of said company and shall be made payable to bearer twenty years after date, and shall have interest coupons thereunto attached and shall be made payable, both principal and interest, at the office of said company in the City of Tucson, in the County of Pima. And said deed of trust or mortgage shall provide that no more bonds than to the amount of thirteen thousand dollars per mile, to be secured by said deed of trust or mortgage, shall be issued by said railroad company."

the time of the issuance of said bonds, or might thereafter be acquired, including also all franchises and privileges of whatsoever kind or nature, and which said deed of trust or mortgage was the first made of or on said property, and said bonds of said company were issued in the name of said company, and were made payable to bearer twenty years after date, and have interest coupons thereunto attached, and were made payable both principal and interest at the office of said company in the city of Tucson, in the county of Pima, and said deed of trust or mortgage provided that no more bonds than to the amount of $13,000 per mile to be secured by said deed of trust or mortgage should be issued by said railroad company, and the said first mortgage bonds of said railroad company were likewise in all other respects made, issued and delivered in full conformity to all the provisions of the said act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad.'"

Opinion of Supreme Court of Territory on this Point.

After reviewing the foreging findings of fact and all the other findings of fact in relation to the original issue of these bonds, and the relation of Coler and Company to the construction of the railroad, the Supreme Court of the Territory unanimously found that the bonds of Pima County were issued and exchanged in good faith, in compliance with the terms of the act of February 21, 1883, and that they were bonds of the class which the act of Congress of June 6, 1896, required the Territorial Loan Commissioners to refund. Great complaint is made in the argument on the other side that the charter of the Arizona Narrow Gauge Railroad Company contemplated the building of a road some two hundred miles in length, and that funds were not provided by the contractors to build all of such mileage. As an answer to this complaint, as well as to show the views of the Supreme Court of Arizona on the subject of compliance with the Territorial act of February 21, 1883, and the act of Congress of June 6, 1896, we quote the following from the opinion of the Supreme Court of Arizona (Record, pp. 88, 89):

"Do these facts show the bonds in question are included among those required by the act of Congress of June 6, 1896, to be funded? It must be conceded that the county of Pima derived little or no benefit from the building of the few miles of the Arizona Narrow Gauge railroad; however, there can be no question under the proof, that the terms of the act of February 21, 1883, were fully complied with, both on the part of the county, and, as well, on the part of the railroad company, in the matter of the insurance and exchange of the bonds to the extent that the legislative act specifically pro-

vided. There was nothing in evidence showing bad faith on the part of the railroad company, in so far as the first exchange of bonds was concerned, nor is there any evidence which shows bad faith on the part of the company, or its contractor, Walker, and his principals, Coler & Company, except their failure to continue the building and equipment of the road after the completion of the thirty miles of grading and laying of ten miles of track, except such inferences as may be drawn from the fact that both the railroad company and Coler & Company had difficulty in raising the money for the payment of the work done and did not have the resources to go on and complete the work. Can the Court say that notwithstanding the fact that the bonds were exchanged in compliance with the terms of the act of February 21, 1883, they are invalid and not within the provisions of the act of Congress of June 6, 1896, because subsequent to their issue the original holders of those bonds failed to complete the railroad, and the County of Pima thereby received no benefit from the same? The question of a failure of consideration is to be distinguished from that of an exchange of bonds in good faith under the act of June 6, 1896, unless the failure of consideration was due to a failure on the part of the holders of the bonds, to comply with the provisions of the act authorizing their issuance. The legislative act was exceedingly liberal in its terms, and contained no safeguard against the failure of the railroad company to build or operate the road. The only provision looking to the protection of the county was the one which required a certificate of the county surveyor, showing that each five miles of the road was graded and laid with ties and iron as a condition precedent to the exchange of each fifty thousand dollars of county bonds for a like amount of railroad bonds. As the Supreme Court has held in this case, Congress, by the act of June 6, 1896, has validated the territorial act of February 21, 1883; and as the latter did not make the completion of the road a condition precedent to the issuance of the bonds, nor make their validity dependent upon the subsequent conduct of the railroad company, bad faith cannot be predicated of the transaction so long as there was not only a substantial but a literal compliance as well with the requirements of the act under which they were issued.

"We are forced to the conclusion, therefore, that no facts have been shown under the amended return which would warrant us in holding that the bonds in question were excluded from the provisions of the act of June 6, 1896, but, on the contrary, find that it is our plain duty under the decision of the Supreme Court construing said congressional act, and mandatory upon us, to issue the writ of mandate prayed for, requiring the loan commissioners to fund the bonds in question, together with the interest due thereon under the provisions of the act of June 25, 1890."

III.

This proceeding was begun against the Board of Loan Commissioners of the Territory of Arizona. The fact that the officers, to wit, the Governor, Auditor and Secretary of the Territory, who were Loan Commissioners at the time the suit was begun have ceased to be such officers, and that a new Governor, Auditor and Secretary, have been appointed, who, (as the finding expressly provides), because, by virtue of their being Governor, Auditor and Secretary, the Loan Commissioners of the Territory, does not affect the proceeding. The opinion of the Court below on this point is correct (Record, pp. 81, 82).

Speaking with reference to the writ of mandamus the Supreme Court of the United States, in the case of *Thompson vs. United States*, 103 U. S., 480, says (p. 483):

"The proceedings may be commenced with one set of officers and terminated with another, the latter being bound by the judgment," citing cases.

Also (p. 484):

"The duty is perpetual upon the present commissioners and their successors, and the peremptory writ may be directed to and enforced upon the commissioners of the town generally," citing a New York case (s. c. more fully, *infra*, p. 71).

See also,

Dillon on Municipal Corporations, 4th Ed. Sec. 861*b*, and cases cited in the notes.

Leavenworth County Commissioners vs. Sellew, 99 U. S., 624.

The distinction between the case of United States vs. Boutwell, 17 Wall., 604, on the one hand, and the cases of Thompson vs. United States, 103 U. S., 480, and Commissioners vs. Sellew, 99 U. S., 624, on the other hand, is clear and well defined, and the present case is not like the Boutwell case, but is like the latter cases above mentioned.

This distinction has been pointed out by the Supreme Court of the United States in several decisions. In the *Boutwell case* the delinquency in question was that of a single officer—namely, the Secretary of the Treasury—and the delinquency was personal. Whereas in the present case the delinquency is that of the *Board of Loan Commissioners*, which is **a continuing board, with a continuing duty,** although some of the officers may change, and **the delinquency is that of the board** in its failure to

issue the bonds of the territory of Arizona. The Act of Congress creating the Loan Commission (Section 1 of the Act of Congress approved June 25, 1890, 26 U. S. Stat., 175) provides:

"For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona and such future indebtedness as may be or is now authorized by law, the governor of the said Territory, together with the Territorial Auditor and Territorial Secretary *and their successors in office* shall constitute a *board* of commissioners, to be styled *the loan commissioners* of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided."

All through the act the term used is "loan commissioners" or "board of loan commissioners."

The Revised Statutes of Arizona, 1887, Title *Mandamus*, Section 2335, provides as follows:

"The writ of *mandamus* may be issued by the Supreme or District Court to any inferior tribunal, corporation, *board* or person to compel the performance of an act which the law especially enjoins," &c.

Although certain persons were unnecessarily named as Loan Commissioners, yet this suit has been carried on all the way through as a suit against the Loan Commissioners, and not against any one as an individual. The present case is, therefore, fully and strictly within the decisions of the Supreme Court of the United States, where they say, for example, in *Commissioners vs. Sellew*, *supra* (p. 626):

"That principle [namely, the principle in the *Boutwell case*] does not, as we think, apply to this case. There the officer proceeded against was the Secretary of the Treasury of the United States, and the writ was 'aimed exclusively against him *as a person*.' Here the writ is sent *against the board of county commissioners*,

a corporation created and organized for the express purpose of performing the duty, among others, which the relator seeks to have enforced. The alternative writ was directed both to the board in its corporate capacity and to the individual members by name, but the peremptory writ was ordered against the corporation alone."

Precisely the same thing is true in the present case as was true in *Commissioners vs. Sellew, supra*, namely, the Territorial Governor, Territorial Auditor and Territorial Secretary "*and their successors in office*" were constituted a Loan Commission for the express purpose of funding the indebtedness of the Territory and of the counties and municipalities therein. *This board is a continuing body without regard to its individual members.* The object of creating the Governor, Auditor and Secretary *and their successors in office*, the Board of Loan Commissioners, was that the board should be a continuing body by such succession, and should not cease to exist by any change in office. The principle applicable is precisely the same as if the said board had been expressly created a corporation. It is by the Act of Congress made in substance and in fact a board with corporate succession like any corporation. In the *Sellew case* the alternative writ was addressed to the board in its corporate capacity, and to the individual members by name. So here the petition for the writ of mandamus, which corresponds to the alternative writ, was brought against the Board of Loan Commissioners, mentioning also, however, the individual members by name. In the *Sellew case* the peremptory writ was directed against the corporation alone, and the Supreme Court of the United States said that any person who happened to be a member of the board at the time such

peremptory writ was issued should be compelled to obey it. So here the peremptory writ of mandamus may be ordered against the Board of Loan Commissioners of the Territory of Arizona, and any person who happens to be a member of the board at that time can be compelled to obey it.

It may be urged that in the *Sellew case* the Board of County Commissioners was a corporation, while here the Board of Loan Commissioners is not by the statute expressly made a corporation. Two answers to any such objection may be made, namely: (1) The Board of Loan Commissioners are impliedly constituted a corporation, or at least the board is composed of *members who are such by succession*, which, for all the purposes of this case, is precisely the same as any other corporate succession; and (2) that whether or not the Board of Loan Commissioners was expressly made a corporation is immaterial.

In the case of *Thompson vs. United States*, 103 U. S., 480, the officer against whom the mandamus was sought was a clerk of a township. He was not a corporation. Thompson, the township clerk, set up that he was not the clerk against whom the mandamus proceedings were originally brought, but that such clerk had resigned his office. The Supreme Court of the United States held that this was not a sufficient answer. The Court says (p. 483):

"But we cannot accede to the proposition that proceedings in mandamus abate by the expiration of the term of office of the defendant where, as in this case, *there is a continuing duty irrespective of the incumbent*, and the proceeding is undertaken to enforce an obligation of the corporation or municipality to which the office is attached. * * * **The proceedings may be commenced with one set of officers and terminate with another, the latter being bound by the judgment.**"

The Supreme Court of the United States cited (p. 484) the case of *People vs. Collins*, 19 Wend., 56, where Mr. Justice COWEN said:

"The duty is perpetual upon the present commissioners and their successors, and the peremptory writ may be directed to and enforced upon the commissioners of the town generally."

In *Warner Valley Stock Company vs. Smith*, 165 U. S., 28, Mr. Justice GRAY, giving the opinion of the Court, says (p. 32):

"The case of a public officer of the United States differs in this respect from that of *a municipal board*, which is *a continuing corporation* (although its individual members may be changed) and to which in its corporate capacity a writ of mandamus may be directed."

In the present case we have such a municipal board —namely, the Board of Loan Commissioners, which is a continuing body, although its individual members may be changed.

So, also, the Supreme Court in *United States vs. Butterworth*, 169 U. S., 600, says (p. 603):

"In *Thompson vs. United States*, 103 U. S., 480, the distinction is pointed out between proceedings where the obligation sought to be enforced devolves upon a corporation *or continuing body* and those where the duty is personal with the officer. *In the former case there is no abatement.* The duty is perpetual upon the corporation; in the latter, the delinquency charged is personal, and involves no charge against the Government, against which a proceeding would not lie."

Within the rule above stated by the Supreme Court of the United States, *the duty which devolved upon the Board of Loan Commisioners was a continuing duty of a continuing body or board.* It was not a personal duty of a single officer. The act of Congress made it the

duty of the Loan Commissioners, acting on behalf of the Territory, a municipal subdivision of the United States, to issue its funding bonds, the same as in the cases of *Thompson vs. United States*, 103 U. S., 460, and *Commissioner vs. Sellew*, 99 U. S., 624, the statutes of the States of Michigan and Kansas made it the duty of the Clerk of the Township and the Board of County Commissioners of the county, respectively, to act on behalf of the municipal subdivisions of those states. *The Territory continues and the Board of Loan Commissioners continues*, and the Act of Congress has made it *the continuing duty* of the Governor, Secretary and Auditor of the Territory of Arizona *and their successors in office*, acting as a board, to issue the funding bonds in question on behalf of the Territory. The essential things are that this *is a continuing duty devolved upon a continuing board to issue the bonds of a continuing corporation, namely, the Territory of Arizona.*

What the petitioners in the present case have sought is to compel the issuance of the corporate bonds of the Territory of Arizona, which bonds the Territory is required by the Act of Congress to issue. This, under the Act of Congress, is a duty which devolves upon the Territory, irrespective of any individual who happens at any time to be a member of the Board of Loan Commissioners. It is a continuing duty upon the part of the Territory of Arizona to be enforced by the action of the Board of Loan Commissioners, which is a continuing body. In this respect this case is like the case of *Commissioners vs. Sellew, supra*, where the plaintiff had a judgment against the County of Leavenworth recovered on some negotiable county bonds, and was seeking to enforce the corporate

obligation of the County of Leavenworth, and to act by mandamus upon the Board of County Commissioners. So in the case of *Thompson vs. United States*, *supra*, the plaintiff was seeking to enforce against the township its corporate obligation to pay a judgment recovered in favor of the plaintiff, and was seeking a mandamus to enforce that obligation. In all of these cases that which is sought to be enforced and the act which is sought to be done is a continuing one, irrespective of the incumbency of any particular person in office.

In the *case of Boutwell* the Court had under consideration an application for a mandamus against a Cabinet officer of the United States—a high executive officer, who really represents the President and is a part of his official family. It is obvious that the question of issuing a mandamus against a *Cabinet officer* to enforce a *personal* duty is a different thing from the question of issuing one against the *Board* of Loan Commissioners of the Territory of Arizona to enforce a duty imposed *upon them and their successors* by Acts of Congress.

The Supreme Court of the United States, on the former appeal, expressly recognized this suit as against the Board of Loan Commissioners—not against the individuals. The names of the individuals Franklin and others were not mentioned in the entire opinion.

The Court begins its statement of the case by saying (*Utter vs. Franklin*, 172 U. S., 416, p. 416):

"This was a petition for a writ of mandamus to compel the defendants, who were respectively governor, auditor and secretary of the Territory, *acting as loan commissioners*, to issue certain bonds in exchange for bonds issued by the county of Pima," &c.

The Court further says (p. 417): "Whether the *loan commissioners of the Territory* can be required to refund these obligations." And the opinion concludes (p. 425): "We are, therefore, of opinion that it was made the duty of the *loan commissioners* by these acts to fund the bonds in question."

This case, therefore, clearly falls within the doctrine of *Commissioners vs. Sellew*, 99 U. S., 624, and *Thompson vs. United States*, 103 U. S., 480, and is not at all like the case of *United States vs. Boutwell*, 17 Wall., 604.

Furthermore, even if the fact that the special proceeding is not affected by some or all of the members of the Board of Loan Commissioners going out of office and others coming in during the pendency of this proceeding was or could have been at any time open to question, it is no longer open to question owing to the decision of the Supreme Court of the United States in this matter.

The Supreme Court of the United States has rendered its decision and judgment against the Loan Commissioners of the Territory of Arizona. It would not have done so had the action abated, and its rendering the judgment is a decision that the action did not abate either by the changes in the membership of the Board of Loan Commissioners or otherwise. The

persons who were such officers at the time of the decision by the Supreme Court of the United States, were different from those who were such officers when the action was begun. The Supreme Court of the United States, when the action was before it, was bound to take and did take judicial notice of who were the Governor and Secretary and Auditor of the Territory of Arizona. This is under the well-known principle stated in *Greenleaf on Evidence* as follows (13th Ed., Vol. I., Sec. 6):

"They [courts] will also judicially recognize the political constitution or frame of their own government, *its essential political agents or public officers;* sharing in its regular administration, and its essential and regular political operations, powers and action. Thus, notice is taken by all tribunals of the accession of the Chief Executive of the nation or state, under whose authority they act; his powers and privileges; the genuineness of his signature; the heads of departments *and principal officers of state,* and the public seals; the election or resignation of a senator of the United States; the appointment of a cabinet or foreign minister, marshals and sheriffs. * * * The judges of the Supreme Court of the United States are, on this account, bound to take judicial notice of the laws and jurisprudence of all the States and Territories."

The learned counsel for the defendants on their brief (below) admitted this principle of judicial notice.

The action, therefore, of the Supreme Court of the United States in rendering their judgment in this cause against the Loan Commissioners of the Territory is conclusive in the matter that the action has not, in any wise, been affected by the mere change in the membership of the Board of Loan Commissioners.

Change of officers immaterial.—Appellants were made parties.

But this question raised by the defendants, that the persons who were loan commissioner, at the time the suit was begun have ceased to be such loan commissioners is really immaterial. These present loan commissioners appeared in this case after it went back to the Supreme Court of the Territory, their counsel took part in the arguments before the court and in the conduct of the case, and in its submission to the court (Record, p. 113), **and they thus being in court this judgment was entered against them, directing that a writ of mandamus be issued against them, the present defendants, requiring them to fund the bonds in question. This being so, any suggestion that the personnel of the loan commissioners has changed is wholly immaterial.**

The kindred suggestion (defendant's assignment of error, Record, p. 115) **that the judgment now under appeal is erroneous because "N. O. Murphy, C. H. Akers and J. W. Vickers, who are now the governor, secretary and auditor of the Territory of Arizona, were never made parties to this proceeding," is founded in a misconception of fact as well as of law.**

It is not true that the said officers named were never made parties to this proceeding. On the contrary, they, and no other officers, have been in court,

and they and their attorneys have been in court and have taken every proceeding which has been taken on behalf of the defendants from the time that the mandate of this court went down until and including the final judgment from which this appeal is taken, and including, also, the taking of the present appeal. They and their attorneys filed the so-called "amended return" on June 1, 1899, setting up alleged new defenses (Record, pp. 8–21). They filed various motions appearing in the record, and, among others, on March 29, 1900, the motion (Record, p. 69) to dismiss the cause on the ground that the original officers "prior to the filing of this motion, ceased to be officers of the Territory of Arizona and of the loan commission of the said Territory, by reason of their terms of office having expired, of all which this court takes judicial notice. And that the present officers of the Territory of Arizona are N. O. Murphy, governor; Charles H. Akers, secretary, and George W. Vickers, auditor. (Signed) C. F. Ainsworth, Attorney-General." They also filed various affidavits for continuance (Record, pp. 70–78), made stipulations as to the evidence (Record, p. 79); in short, they appeared and defended the case, taking testimony, appearing before the referee, making requests to the court to find the facts and appearing in every stage of the case and resisting and opposing the judgment sought by the petitioners.

That they did appear and were parties to the record and to the cause appears conclusively in the judgment entered in the Supreme Court of the Territory (Record, p. 113), which, after entitling the case, proceeds:

"This cause coming on further to be heard, and the plaintiffs and petitioners appearing by William H.

Barnes, their attorney, and the Loan Commissioners of the Territory of Arizona, to wit: N. O. Murphy, governor; George W. Vickers, auditor, and Charles H. Akers, secretary, appearing by Charles F. Ainsworth, attorney-general, and the said cause having been argued by the respective counsel for the petitioners and defendants, and submitted to the court upon the petition for writ of mandamus filed herein on or about the 31st day of December, 1896," etc., etc., "it is * * * further considered, ordered and adjudged that a peremptory writ of mandamus do issue, directed to N. O. Murphy, governor; George W. Vickers, auditor, and Charles H. Akers, secretary, the present loan commissioners of the Territory of Arizona, being successors in office to respondents Franklin, Leitch and Bruce, and their successors in office as such loan commissioners, commanding them, upon the tender by the plaintiffs of the $150,000.00 of bonds of the county of Pima," etc., etc.

This judgment, therefore, establishes conclusively that the present loan commissioners formally appeared in the cause as the loan commissioners, and were represented by the Attorney-General, their official legal adviser and attorney.

The assignment of error, that Murphy, Akers and Vickers were never made parties to this proceeding is not true in point of fact, and if any formal order making them such were necessary, such order has been made.

In point of law, however, as above shown, even if they had not appeared, and had not thus been made parties to the record as loan commissioners, they would be bound (as the authorities above cited fully show) as the official successors of their predecessors who were in office as loan commissioners when the proceeding was begun.

IV.

The statute passed at the session of 1899 by the Legislature of the Territory of Arizona, repealing or attempting to repeal Section 1 of the old Territorial Funding Act of 1887 and Section 1 of the Act of the Territory of Arizona of March 19, 1891, has no effect whatever upon the rights of the relators or upon the proceedings in this cause.

The following is a copy of the Act of 1899:

No. 32.

AN ACT

To Abolish the Loan Commission and to Repeal Sundry Laws Relating Thereto.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECT. 1. That Paragraph 2039, Sect. 1, Chapter one, Title 31, of the Revised Statutes of the Territory of Arizona; also, that Sect. 1 of Act No. 79,* Session Laws of the Sixteenth Legislative Assembly of the Territory of Arizona; also, Act No. 33† and Act No. 74,† Session Laws of the Eighteenth Legislative Assembly of the Territory of Arizona, are hereby repealed.

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* This is Act March 19, 1891, for text of which act see our brief in *Utter vs. Franklin*, p. 85, reprinted and filed herewith.

† These two acts have no bearing upon *Utter case*. No. 33 relates only to *territorial* indebtedness incurred December 31, 1890, to December 31, 1895, and refunding thereof as provided in Act of Congress August 3, 1894, and approves Act of Congress August 3, 1894. No. 74 is merely "An Act to remedy defects in the records of the loan commissioners of the Territory of Arizona," as its title indicates.

SECT. 2. This Act shall take effect and be in force from and after its passage.

HENRY F. ASHURST,
Speaker of the House.

MORRIS GOLDWATER,
President of the Council.

Governor.

This bill having been returned by the Governor with his objections thereto, and, after reconsideration, having passed both houses by a two-thirds vote of each house, has become a law this 13th day of March, A. D. 1899.

HENRY F. ASHURST,
Speaker of the House.

MORRIS GOLDWATER,
President of the Council.

After the foregoing act was passed by the Legislative Assembly of Arizona, and when it was presented to the Governor of the Territory, N. O. MURPHY (one of the defendants), for his approval, he submitted it to Hon. CHARLES F. AINSWORTH, the Attorney-General of the Territory, for his opinion, and the Attorney-General rendered an opinion advising the Governor that the act was void so far as attempting to abolish the Loan Commission of the Territory was concerned. Accordingly, the Governor sent to the Legislative Assembly a message refusing his approval of the act, and accompanied his message with the opinion of the Attorney-General This message of the Governor and the opinion of the Attorney-General are as follows :

Veto message of Governor N. O. Murphy (one of the defendants), on the ground that the Territorial Legislature had no power to abolish Loan Commission.

HIS REASONS FOR NOT SIGNING BILL ABOLISHING FUNDING COMMISSION.

The following is the text of the governor's veto of the loan commission bill which was sent to the council on Saturday:

"TO THE HONORABLE, THE COUNCIL OF THE TWENTIETH LEGISLATIVE ASSEMBLY OF ARIZONA:

"I have the honor to return without my approval council bill No. 38, for the following reasons:

"If signed, it would be entirely nugatory and inoperative, as is clearly set forth in the opinion of the attorney-general herewith, which is made a part of this message, and to which your attention is respectfully invited; and, while the terms of the bill do not so specify, it is presumed that its purpose is to prevent the performance of official duties under existing law which may conflict with public interests and policy.

"The questions involved are purely legal, which can only be reached through the courts and congress. The legislature of the territory has clearly no jurisdiction over, nor power to settle them. Whether or not the legislation which created and has continued the loan commission has been wise and beneficial, are questions of policy, and not of law, and are not pertinent in this connection; and the same is true as to the manner in which the law has been or may be executed. It is the law itself only with which you have now to deal. If unfortunate and unjust burdens have been imposed upon the people in the past because of the operation of the existing funding law, or if it is feared that the law will work hardship in the future, the proper recourse is with congress to repeal unjust statutes, and with the courts to control the manner of their execution, and, if necessary, enforce or restrict them by mandate or injunction.

" It may have been unwise to fund certain indebtedness heretofore, and it may be unwise and undesirable to fund any further indebtedness ; yet a procedure that is nugatory can in no wise relieve the situation, and it is not improper to say that the act of funding obligations does not make them legal, nor validate them in any way. A converted security is just as much a proper subject for legal attack after as before conversion. The material question here involved is, whether or not the legislature has power to abolish the loan commission and repeal certain laws. In my judgment, it is clearly evident that no such power exists, and that the only proper way to accomplish such a result is through congress ; and the only proper way to reach invalid securities is through the courts.

" A careful reading of the report of the attorney-general is requested.

" (Signed) N. O. MURPHY,
" Governor."

Opinion of Attorney-General Ainsworth, as legal adviser of the Governor, to the effect that the Territorial Legislature had no power to abolish the Loan Commission.

" OFFICE OF THE ATTORNEY-GENERAL,
PHŒNIX, ARIZONA, March 10, 1899.

" HON. N. O. MURPHY,
Governor of the Territory of Arizona,
Phœnix, Ariz. :

" SIR—Replying to your favor of March 9, in which you request my official opinion upon council bill No. 38 of the Twentieth legislative assembly, entitled ' An Act to Abolish the Loan Commission and to Repeal Sundry Laws Relating Thereto,' also as to the legal points involved in connection with the different congressional acts on the subject, and whether or not such a law would be operative and could be enforced ; also as to its probable effect, beg to report that in my opinion this act if it should become a law would only have the effect to repeal section one of act No. 79 of

the session laws of the Sixteenth legislative assembly. [That is, the Territoral Act approved March 19, 1891, reprinted in our Brief in *Utter vs. Franklin*, pp. 85–89).

So far as council bill No. 38 attempts to repeal paragraph 2039, section 1, chapter 1, title 31 of the revised statutes of Arizona, 1887, the act would be nugatory, as there is no such section to repeal. Congress, by act approved June 25, 1890, amended title 31, revised statutes of 1887, known as the finding act, and as amended it approved and confirmed it subject to future territorial legislation, and repealed all acts in conflict with the provisions of the act as amended. If, on the other hand, it is the purpose or intention that council bill No. 38 repeals this act as approved and confirmed by congress, then it is clearly beyond the province of the territorial legislature to do so.

It will be observed upon reading the act of congress of June 25, 1890, that among other things it provides that the existing and outstanding indebtedness, together with such warrants as may be issued for the necessary and current expenses for carrying on territorial, county, municipal and school government for the year ending December 31, 1890, may also be funded and bonds issued for the redemption thereof; and that thereafter no warrants, certificates or other evidences of indebtedness shall be allowed and issued or be legal where the same is in excess of the limit prescribed by the Harrison act. If, under the provision in the act of congress aforesaid, being section 15 thereof, as by congress amended and confirmed subject to future territorial legislation, it was intended by congress to authorize the territory to legislate upon this particular act, then it is clear that the territorial legislature could, irrespective of congress, from time to time extend the limit as to what indebtedness funding bonds could be issued, and in place of having that time expire on the 31st of December, 1890, as prescribed by the act of June 25, 1890, the territorial legislature could provide that it should not expire until 1900.

If, therefore, the territorial legislature has power to amend or abolish section one of this act of congress, they have the equal right to abolish or amend any other section, including section 15 above quoted. It has never been claimed or contended by any territorial legislature of this territory, that they had any such right; on the contrary, when they have desired the time extended or this act of congress amended,

they have applied directly to congress for such extension or amendment. **What congress meant, in my opinion, by the expression in the act of June 25, 1890, "subject to future territorial legislation," is, that the territorial legislature could pass other and further laws on this subject as the territory might require, not in conflict with the provisions of that act, and this conclusion is the natural deduction from the subsequent acts of both congress and the territorial legislature upon this subject, for they have both treated this act of June 25, 1890, as exclusively under the control of congress and not subject to modification by territorial legislation.**

Congress by an act approved July 13, 1892, amended this act of June 25, 1890, by providing that the interest on the bonds should be payable semi-annually on the 15th of January and July in each year. Again, on August 3, 1894, congress amended this act of June 25, 1890, by providing that the present outstanding warrants, certificates and other evidences of indebtedness issued subsequent to December 31, 1890, for the necessary and current expenses of carrying on the territorial government only, together with such warrants as may be issued for such purpose for the year ending December 31, 1894, and December 31, 1895, might also be funded and bonds issued for the redemption thereof, and thereafter; no warrants, certificates or other evidence of indebtedness should be allowed to issue or be legal where the same are in excess of the limit prescribed by the Harrison act.

And, again, on June 6, 1896, congress amended this act of June 25, 1890, also the act of congress amending the same, approved August 3, 1894, by authorizing the funding of all outstanding obligations of said territory and the counties, municipalities and school districts thereof, as provided in the act of congress approved June 25, 1890, until January 1, 1897. In this act of June 6, 1896, the following language is used: "An act amending and extending the provisions of an act of congress entitled 'An Act Approving With Amendments, the Funding Act of Arizona, Approved June 25, 1890, and the Act Amendatory Thereof and Supplemental Thereto, Approved August 3, 1894,'" thus conclusively showing that congress itself in dealing with

this subject treated the act of June 25, 1890, as an act of congress and not as an act of the territorial legislature, and in all its amendments to the act of June 25, 1890, it has treated the act as though the territorial legislature had no power or control whatever over the act.

The conclusion is irresistible that the territorial legislature has no more power or authority over the act of June 25, 1890, as passed by congress, than they have over the organic law of the territory. Both the organic law and the act of June 25, 1890, emanate from the same fountain head, viz.: congress. All the laws of the territorial legislature must be subordinate and not in conflict therewith.

I am, therefore, clearly of the opinion that should you approve this act, nevertheless, it would be void so far as it attempts to abolish the loan commission of the territory, by endeavoring to repeal paragraph 2039, section 1, chapter 1, title 31, revised statutes of Arizona as amended, approved and confirmed by act of congress of June 25, 1890.

Respectfully submitted,

CHARLES F. AINSWORTH,
Attorney-General.

Opinion of the Supreme Court of the Territory of Arizona in this case to the same effect, all the four judges of that court unamiously holding that the Territorial Legislature had no power to abolish the Loan Commission.

The Supreme Court of the Territory of Arizona also unanimously came to the same conclusion—to wit, that the said repealing act of 1899 had no effect whatever upon the proceedings in this cause. We quote from the opinion of that court as follows (Record, pp. 82–84):

"The question as to whether the loan commission has been abolished is one which involves a considera-

tion of not only the repealing statute, but, as well, the various acts, congressional and territorial, relating to the creation of the commission, its duties and the general subject of funding. In the Revised Statutes of 1887 there was incorporated, as 'Title XXXI.,' an act which provided for the creation of a commission to be known as the loan commissioners, and the funding by this commission of the outstanding and existing indebtedness of the Territory. This commission was to be composed of the governor, auditor and secretary of the Territory. Congress, by the act of June 25, 1890, amended the territorial act in important particulars, and then 'approved and confirmed' the same, 'subject to future territorial legislation.' The territorial legislature, construing the clause 'subject to future territorial legislation' to mean that Congress, having taken up the territorial act of 1887 and amended it before making it binding and operative upon the Territory, chose to confer upon the latter the privilege of consenting to or disapproving of its provisions by its act of March 19, 1891, supplemented the congressional act by additional provisions intended to more perfectly carry out its provisions, and in the first section declared that the latter act should 'be, and the same is hereby, now re-enacted as of the date of its approval.'"

The language used in the territorial act indicates that the territorial legislature intended to approve of the congressional act and accept its provisions, under the permission granted and expressed in the clause, "subject to future territorial legislation." Whether this construction was primarily right or not, it has been subsequently followed by the Legislative Assembly of the Territory, and acquiesced in by Congress. Congress by the act of August 3, 1894, amended section 15 of the act of June 25, 1890, by extending its provisions so as to permit the funding of additional indebtedness. When the next legislature convened after the passage of the congressional act just mentioned, construing, as it did its predecessors, the clause, "subject to future territorial legislation" to mean that the congressional act should only become operative when accepted by the Territory through its General Assembly, by act approved March 19, 1895, ratified and confirmed the objects, purposes and provisions of the congressional act. In the congressional act of August 3d, 1894, a d in the curative act of congress of

June 6, 1896, the act of Congress of June 25, 1890, is referred to, and no mention is made of a re-enactment of the same by the territorial legislature, which is significant as indicating that Congress recognized the act of June 25, 1890, as having become operative, and as continuing in force, and as constituting the existing law upon the subject of funding. Congress having full authority to legislate directly for the territory, and the territorial legislature having only such power as is specifically delegated to it by Congress, whenever the latter legislates upon any subject pertaining to the territory, such legislation has the force and effect of a constitutional provision, and becomes a part of the organic law. Had the clause, "subject to future territorial legislation" not appeared in the act of June 25, 1890, unquestionably the act would have become immediately operative without the consent or acquiescence of the Territory, and no subsequent legislation by the territorial legislature would have been needed to give it effect, or could in any way affect its provisions. In the light of the contemporaneous construction placed upon the clause "subject to future territorial legislation" by the legislature of the Territory, and in view of the fact that Congress thereafter invariably referred in subsequent legislation to the act of Congress of June 25th, 1890, and made no mention of any re-enactment of the same by the Territory, and considering the relation which the Territory sustains to Congress, we are led to the conclusion that the act of June 25, 1890, is now to be construed as having been accepted in accordance with the permission granted to accept or refuse the same, and, having been accepted, is now the paramount law upon the subject of funding and become a part of the organic law, to the extent, at any rate, that it may not be changed so as to render any of its provisions inoperative by any act of the territorial legislature, except with the express consent of Congress.

The repealing statute which we have referred to, being act No. 32 of the laws of 1899, reads as follows: "That paragraph 2039, section 1, chapter I., title XXXI., of the Revised Statutes of the Territory of Arizona; also that Section 1 of act No. 79, session laws of the 16th Legislative Assembly of the Territory of Arizona; also act No. 32 and act No. 74, Session Laws of the 18th Legislative Assembly of the Territory of Arizona,

are hereby repealed." Paragraph 2039 referred to in this act, was reincorporated as the first section of the Congressional Act of June 25, 1890, and reads as follows: "For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona, the governor of the said Territory, together with the territorial auditor and the territorial secretary, and their successors in office, shall constitute a board of commissioners to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the power and perform the duties hereinafter provided." Act No. 79 referred to, is the act of March 19, 1891. Acts No. 33 and acts No. 74, sought to be repealed by the act, do not pertain to the creation of the board of loan commissioners, and their consideration is not important in this connection.

The Act of Congress of June 25, 1890, covered the whole field of the previous territorial legislation upon the subject of funding, and included such new legislation as to clearly indicate the intent that it should take the place of the Territorial Act of 1887. When two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the former, and embraces new provisions, plainly showing that it is intended as a substitute for the first act, it will operate as a repeal of that act.

U. S. vs. Tynin, 11 Wall., 88.

The act of Congress being revisory in its terms, embracing new provisions and covering the whole subject of funding, supplemented and thereby repealed the territorial statute of 1887.

As repeals by implication are not favored, the repeal of the first section of the statute of 1887 can therefore have no effect to repeal the similar provision of the act of June 25, 1890.

Again, by the attempted repeal of the first section of the act of March 19, 1891, which, as we have seen, provided in terms "that the act of Congress entitled, 'An act approving, with amendments, the funding Act of Arizona approved June 25, 1890,' be, and the same is hereby, now re-enacted as of the date of its approval", the intent of the legislation is uncertain in that it is not made evident whether the repeal of said section is to be construed as an attempt to repeal the

whole, or only a part of the congressional act, if it can possibly be construed as tending to either result. It can hardly be construed as an attempt to repeal the whole of the act of June 25, 1890, inasmuch as the other section of the act of March 19th, 1891, were excepted from the repealing act, and these were supplemental to the congressional act. If the repealing of section 1 of the law of 1891 be construed as a repeal of only a part of the act of June 25, 1890, how then can the court give it effect by declaring what portion of said act it was designed and intended to affect? Irrespective, therefore, of the question of the power of the territorial legislature to repeal the congressional act creating the loan commission, it is more than doubtful if the act of 1899 can be construed so as to effect that result."

In support of and in addition to the reasons given by Attorney-General AINSWORTH, and by the Supreme Court of the Territory, there are several reasons why this act of 1899 has no effect upon the proceedings then pending for the issue of funding bonds of the Territory.

There can be no doubt of the soundness of the views of the Governor of the Territory, N. O. Murphy, the Attorney-General of the Territory, Charles F. Ainsworth, and the four justices of the Territory, above quoted, that the funding act of Congress approved June 25, 1890, is an act of Congress, and is to be so regarded, and is not to be regarded as an act of the Territory subject to repeal by the Territorial legislature.

When Congress took up this matter of funding indebtedness in the Territory of Arizona, it went over the whole situation. There had previously existed the funding act of the Territory of March 10, 1887, which authorized the funding of Territorial indebtedness only. In the act of June 25, 1890, Congress provided for the funding of county, municipal and

school district indebtedness. Congress, also, in going over the whole subject, made many new provisions as to funding indebtedness.

We print in the appendix to this brief a copy of the act of June 25, 1890, showing in italics the new provisions made by Congress in this act, also showing in brackets certain provisions made by the Territory in its act of March 10, 1887, which Congress did not adopt. This act of June 25, 1890, therefore, is emphatically an act of Congress, dealing with all phases of the subject of funding.

Furthermore, Congress ever after this, whenever it referred to funding of indebtedness by the Territory of Arizona, referred only to its own act, and never to any Territorial acts. Thus, for example, in the act approved July 13, 1892 (reprinted in brief in *Utter vs. Franklin*, p. 89), Congress amends, not any Territorial act, but amends its own act of June 25, 1890. So, also, in the act of Congress approved August 3, 1894 (reprinted in brief in *Utter vs. Franklin*, p. 90), Congress there amends section fifteen of its own act approved June 25, 1890. So, also, in the act of Congress approved June 6, 1896, which validated these bonds and directed them to be funded, the title is "An Act amending and extending the provisions of *an act of Congress*, entitled" etc., "approved June 25, 1890."

All this shows that in the said act of June 25, 1890, Congress dealt at length and in detail with the whole subject of the funding indebtedness of the Territory of Arizona and its municipalities, and, therefore, by various amendments, referred to this act of June 25, 1890, as an act of Congress—its own act—and gave not the least evidence in any shape or manner whatever

that it regarded the said act as anything other than the act of Congress.

The Governor and the Attorney-General and the Supreme Court of the Territory of Arizona were, therefore, clearly right in holding that this act of June 25, 1890, was an act of Congress, of which neither section one nor any other part thereof could be repealed by the Territorial Legislature.

(1) The said act of 1899 of the Territory does not repeal or undertake to repeal the Acts of Congress of June 25, 1890, and June 6, 1896, under which these bonds are to be funded.

The Supreme Court of the United States, in its decision in the present case, expressly states that the Act of June 6, 1896, provides that these bonds "*shall* be funded." It is perfectly plain and obvious that the Legislature of the Territory of Arizona cannot, in any way, repeal an Act of Congress. The said Act of the Legislature of the Territory does not repeal or undertake to repeal the said Act of Congress of June 25, 1890, or the Act of June 6, 1896, creating the Loan Commission, and providing for the issue of the funding bonds now in question.

Said repealing act does not and cannot, under any possible theory whatsoever, have any effect upon the act of Congress approved June 6, 1896, which validated these bonds, and provided that they should be funded "as provided in the act of Congress approved June 25, 1890."

History of the enactment of the act of Congress, approved June 6, 1896, showing that Congress itself dealt directly with the question of validating these bonds, and provided that they should be funded, and that the Legislature of the Territory of Arizona has no power or authority whatsoever to repeal, or in any way interfere with, these express provisions of the act of Congress of June 6, 1896.

We have printed in the summary at the beginning of this brief the titles and dates of the Acts of Congress and of the Territory of Arizona relating to the bonds in question in chronological order. It will aid in arriving at a correct understanding of the meaning and effect of the act of June 6, 1896,if we consider these acts chronologically.

February 21, 1883, the Territory passed an act entitled "An Act to promote the construction of a certain railroad." This is the act under which were issued the bonds in question in aid of the Arizona Narrow Gauge Railroad Company.

In 1894 these bonds were held invalid in the case of *Lewis vs. Pima County*, 155 U. S., 54, on the ground that they were not obligations of the county "necessary to the administration of its internal affairs" within the meaning of the act of Congress approved June 8, 1878. (See this act reprinted in brief in *Utter vs. Franklin*, p. 60.)

Under the rule announced by this Court in its decision in *Lewis vs. Pima County*, 155 U. S., 54, 1894, a large number of railroad-aid bonds, issued under authority of acts or territories, were illegal. We

refer to these acts and to the bonds issued thereunder in our brief in *Utter vs. Franklin*, and a list of some of the bonds is given in the report of Senator HARRISON, printed in the Appendix in our brief in *Utter vs. Franklin*, pp. 58, 59.

Under these circumstances the question arose as to what should be done with reference to these various railroad aid bonds which had been issued under the provisions of and in compliance with the acts of territorial legislatures, enacted when it was supposed that these territorial legislatures had a right to enact such statutes. Of course these obligations, issued and purchased in good faith, ought to be paid. Every right-minded man would so agree. Accordingly, the territorial Legislative Assembly of Arizona of 1895 adopted a Memorial to Congress asking for the enactment of some law which would validate such bonds. The text of this Memorial is printed in our brief in *Utter vs. Franklin*, pages 36, 37, as a quotation in the opinion of the Supreme Court of the Territory of Arizona in *Coconino County vs. Yavapai County*, which opinion held railroad aid indebtedness of Yavapai county valid and the funding bonds issued to fund the same valid. This case also was afterward affirmed by the Supreme Court of the United States on appeal, 176 U. S., 681. Said memorial of the Legislative Assembly of Arizona is quoted and referred to in the opinion of this court in this case on former appeal, *Utter vs. Franklin*, 172 U. S., 416.

In 1896 this memorial was before Congress, and Congress passed the act approved June 6, 1896, which validated these bonds, and directed that they be funded in accordance with the act of Congress approved June 25, 1890, as this court expressly held on

the former appeal in this case, *Utter vs. Franklin*, 172 U. S., 416.

This chronological history of the events and reasons which led to the passage of the act of Congress approved June 6, 1896, validating the bonds in question, and directing that they be funded, shows that Congress intended in said act of June 6, 1896, itself to deal with these very bonds, and Congress has itself enacted in said act that these bonds shall be funded as provided in the act of Congress approved June 25, 1890. It also further shows that whatever may be the policy and effect of the legislation with respect to funding indebtedness generally, Congress has in said act of June 6, 1896, dealt specifically with the particular indebtedness now in question, and has directed that *that* shall be funded. It was not contemplated by Congress that the Territory of Arizona should have the power to contravene this express provision of the said act of Congress of June 6, 1896. Congress did not leave it to the Legislature of the Territory of Arizona to say whether or not this Pima county indebtedness was validated and should be funded, but Congress itself said that it was validated and should be funded, and gave no power to the Legislature of the Territory to repeal this provision, or to deal with it in any way, shape or manner whatsoever. This provision of the act of June 6, 1896, stands to-day unrepealed and wholly incapable of repeal by the Legislature of Arizona.

It is necessary to keep in mind the relation of Congress to the territories and to the territorial legislatures. Congress is the superior body, responsible for the good government of the territories, and responsible that the territories and their counties shall be re-

quired to pay their obligations honestly incurred. Bear in mind also that Pima County, which has delegates in the Legislative Assembly of the Territory of Arizona, has a direct interest in repudiating its obligations, and might naturally have the sympathy of the delegates from other counties. Keeping all these things in mind, it is to be remembered that Congress dealt with the matter of these bonds directly and without committing the matter in any way whatsoever to the Legislative Assembly of the Territory. Under all these facts and circumstances it cannot be believed for a moment that Congress intended to commit, or did commit, to the Territory of Arizona the power to repeal the will of Congress expressed in this act of June 6, 1896, that these bonds should be validated and should be funded.

We repeat, therefore, that whatever may be the effect of the repealing act of the Territory of 1899 as respects funding of indebtedness generally, such act can have no possible effect whatever on the funding of this indebtedness which Congress, in the said act of June 6, 1896, expressly directed should be funded.

The territory, by its memorial, besought Congress to pass such act as that of June 6, 1896. Such an act was beyond the power of the territorial legislature to pass. Congress alone could act. By the passage of the act of June 6, 1896, Congress adopted its own policy in respect of such debts. That policy was that such debts should be validated and should be funded and Congress did not leave with or give to the territorial legislature of Arizona any power whatever to repeal or affect the act of June 6, 1896, or thwart or defeat the policy and purpose of Congress in its enactment.

Supposing, for the sake of argument, it were to be admitted that said repealing act of the Territory of 1899 had repealed section one of the act of Congress approved June 25, 1890 (which, however, we deny, as the Legislative Assembly of the Territory plainly cannot repeal an act of Congress, or any part thereof), still the Legislative Assembly of the Territory has not repealed, or even attempted to repeal, or even mentioned, the act of Congress approved June 6, 1896. (Full text of this Act, see Brief in *Utter Case*, filed herewith, pp. 30, 31.) That act provided (Sec. 1) that the bonds in question "shall be funded, with the interest thereon which has accrued and may accrue until funded into the lower interest bearing bonds as provided by this act." "This act," that is, the act of June 6, 1896, expressly provides

"that the provisions of acts of Congress approved June 25th, 1890, and August 3rd, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities and school districts thereof, as provided in the act of Congress approved June 25, 1890."

In other words, the said act of Congress approved June 6, 1896, expressly provides that these very bonds shall be funded as provided in the "act of Congress approved June 25, 1890." This act of June 6, 1896, stands in full force and unrepealed. This act has not been and cannot be repealed by the Territorial legislature. It is clear, therefore, that even if it be supposed that the Legislative Assembly of the Territory of Arizona had the power to repeal, and did repeal, section one of the act of Congress approved June 25, 1890, generally, and so far as concerns indebtedness

not covered by the said act of Congress approved June 6, 1896, yet the Legislative Assembly of the Territory had no power whatever to repeal, and did not undertake or attempt to repeal, any of the provisions of the said act of Congress approved June 6, 1896. Therefore, even supposing that section one of the act of June 25, 1890, is repealed so far as concerns all other indebtedness, yet, said act, approved June 25, 1890, including section one thereof, as well as all other parts of the said act, was in full force and effect, *so far as respects the funding of the indebtedness provided in the act of June 6, 1896, to be funded.* This is the express provision of the act of Congress of June 6, 1896—namely, that these very bonds now in question shall be funded as provided in the act of Congress approved June 25, 1890. This express provision of the Act of June 6, 1896, the Legislative Assembly of the Territory did not attempt to repeal and could not repeal. We do not, in this case, need to say (although that is the correct view, and that is the view which was taken by the Attorney-General of the Territory, and by the Governor, and by the unanimous opinion of the four justices of the Supreme Court of the Territory) that section one of the act of Congress of June 25, 1890, was not repealed by the act of the Territory of 1899. All we need to say is that the act of June 6, 1896, was not repealed, and that the act of June 25, 1890, including section one thereof, is alive, and is, by force of the act of June 6, 1896, kept alive, *so far, at least, as funding the bonds authorized and expressly provided by the said act of Congress of June 6, 1896, to be funded as provided in the act of Congress approved June 25, 1890.*

Although a statute is repealed generally yet it may be in force for certain purposes. See to this effect *Siebert vs. Lewis*, 122 U. S., 284, in which this court held that a statute of Missouri which provided for the levying of taxes to pay interest on county bonds was in full force and effect as respects bonds issued thereunder, although it had been repealed by the legislature. On this point the court said, Mr. Justice MATTHEWS giving the opinion (p. 299):

"It [the opinion of the Supreme Court of the State of Missouri] also assumes for that reason, that those provisions of the Revised Statutes are the only laws in force for the collection of such a tax—those in force in 1871, when the judgment of the Circuit Court was rendered, having been repealed.

For the reasons which we have pointed out, we are unable to concur in the judgment of the Supreme Court of Missouri, and are constrained to hold that the sections of the Revised Statues in question impair the obligation of the contract with the relator under the act of March 23, 1868, and as to him are, therefore, null and void by force of the coustitution of the United States; and that *the laws of Missouri, for the collection of the tax necessary to pay his judgment, in force at the time when it was rendered, continue to be and are still in force for that purpose.*"

S. P. *Memphis vs. Brown*, 97 U. S., at p. 295 (bottom) and p. 296 (top), to which especial reference is made (see *infra*, p. 103, of this brief).

See, also, to the same effect, *Village of Champlain vs. McCrea*, 165 N. Y., 264 (quoted more fully, this brief, p. 107), where the court held that a water system act of 1875 was in force as to the village of Champlain, although it had been repealed by the general village law of 1897.

(2) Furthermore said repealing Act of 1899, passed after the decision of this court

on the former appeal in this case, had no effect in this case because the statutes of Arizona expressly provided that a repeal did not affect " any right then already existing or accrued at the time of such repeal, or any action or proceeding theretofore taken," &c.

Section 2934 of the Revised Statutes of Arizona provides as follows :

" 2934. (Sec. 7.) The repeal or abrogation of any statute law or rule does not revive any former statute law or rule theretofore repealed or abrogated, nor does it affect any right then already existing or accrued at the time of such repeal, or any action or proceeding theretofore taken, except such as may be provided in such subsequent repealing statute, nor shall it affect any private statute not expressly repealed thereby."

It will be noticed that this section provides: " The repeal or abrogation of any statute law does not affect any right then already existing or accrued at the time of such repeal, or any action or proceeding theretofore taken, except such as may be provided in such subsequent repealing statute."

Our " right " to have our bonds funded " existed " and had fully " accrued " at the date of the repeal and that right had been adjudged by this Court not only to " exist " but to be perfect and complete before the date of said repealing act of March 13, 1899. Therefore, even if this repealing act were valid, and did in fact repeal the sections of the statutes therein referred to, it would not affect our right to have the funding bonds issued; because (1) our right was within Section 2934 above quoted " a right then already existing or accrued at the time of

such repeal;" and (2) because the Utter case was "an action or proceeding theretofore taken," and actually pending for judgment at the date of the passage of said repealing act. Therefore, *quoad* the relators' rights which had been adjudged to exist prior to the repealing act and *quoad* the relators' case then pending awaiting judgment, the repealing act is by the very terms of Section 2934 without force or effect.

Memphis vs. United States in Point and Controlling.

The case of *Memphis vs. United States*, 97 U. S., 293 (1887), is "on all fours" with the present case and requires an affirmance of the judgment of the Supreme Court of the Territory of Arizona now on appeal. Shortly, the facts were these: In 1867, one Brown made a contract with the city of Memphis to pave certain streets. When that contract was made the previous act of February 13, 1854, was in force, which limited the city in the levy of a tax for all purposes to a certain specified rate. Under the said act of 1854 or other legislation in force at that time, and down to 1873, there were provisions for assessments upon the property owners for improvements, as security for the payment of such improvements as Brown had made. Brown did the work while these provisions were in force, and when it came time for payment that security failed. This was all prior to the act of March 18, 1873. Then came this act of March 18, 1873, after Brown had done all his work, which act provided that:

"the said city shall have the power to levy a tax, in addition to all other taxes allowed by law, sufficient to cover the entire cost of the improvement, with interest thereon, for which said special assessments were illegally made," etc.

Afterwards—to wit, March 16, 1875, Brown obtained, in the Federal Courts, a decree against Memphis for the payment to him of a specified amount of money for materials furnished and work done under the contracts of 1867 for paving certain streets. Execution was issued and returned "No property found." March 22, 1875, Brown applied for an *alternative* writ of mandamus to compel the city to pay the decree, or, in default thereof, to levy and collect, as authorized by the said act of March 18, 1873, a tax, in addition to all other taxes, sufficient to pay his judgment. On March 20, 1875, the legislature, by an act passed that day, but which was approved by the Governor and took effect on the 23d day of March, 1875, unconditionally repealed the said act of March 18, 1873. The alternative writ of mandamus above mentioned was issued on March 26, 1875 (97 U. S., at p. 285), and on the same day the city filed an answer setting forth that its treasury was empty and its power of taxation, which for general purposes was limited to one per cent, exhausted, and that it was a misdemeanor to apply special taxes for any other object than that for which they had been levied, and that the said act of March 18, 1873, had been repealed, etc., etc. (See, for above facts, 97 U. S., pp. 285–295.)

The Code of Tennessee, Section 49, concerning the effect of repealing statutes, as quoted by the Court, page 298, was as follows :

"The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed."

It was held by the Supreme Court of the United States (*Memphis vs. United States*, 97 U. S., 293,) that the repealing act did not become a law until it was approved by the governor on March 23, 1875, and that prior thereto Brown, by his decree and application for mandamus, which was a proceeding commenced by virtue of the act of March 18, 1873, had acquired a vested right, which was not defeated by the repealing act approved March 23, 1875, to have a tax, payable in lawful money, levied sufficient to pay his judgment, although it required the levy of a tax beyond the rate limited in the act of 1854, which was in force in 1867 when Brown's contract was made.

It rarely chances that two cases occur so closely parallel in their facts and identical in their principles. We cannot set forth at length in this brief the unanimous opinion of this Court as delivered by Mr. Justice STRONG. A few extracts must suffice. They afford a complete answer to the point urged in the brief of the learned counsel for the defendants in the present case (*Ford's brief, pp. 59-65*), that the relators in the present case, by virtue of their application under the acts of Congress and the Territorial legislature for a mandamus to compel the funding of their bonds, and by virtue of the judgment and opinion of this Court that they were entitled to have their bonds funded, nevertheless had, at the time of the territorial repealing act of March 13, 1899, no "right" which it was not competent for the Territorial legislature to take away by repeal. Mr. Justice STRONG, speaking of the

Tennessee act of March 18, 1873, which empowered the city to levy a tax in addition to all other taxes sufficient to pay Brown's judgment, and of his application for a mandamus, and of the repeal, after such application, of the said act of March 18, 1873, says (p. 295):

"It is claimed, however, that it [Act March 1873] was repealed before the Circuit Court awarded the *mandamus*, and what was the effect of that legislative action upon the power of the court in this case becomes therefore a very important question. It is an acknowledged principle that a creditor by contract has a vested right to the remedies for the recovery of the debt which existed at law when the contract was made, and that the legislature of a State cannot take them away without impairing the obligation of the contract, though it may modify them, and even substitute others, if a sufficient remedy be left, or another sufficient one be provided. The law is in effect a part of the contract. But it is not so clear that when a new remedy is authorized after a contract has been made, that remedy may not be wholly taken away by the legislature, before any vested rights have been required under it. In such a case the parties did not contract with reference to it, and it did not enter into their agreement. It had nothing to do with the obligations they assumed. It is, however, no less true that vested rights may be acquired by the creditor under it and by virtue of it; and when such rights have been acquired, they are beyond the reach of the legislature, and the repeal of the law will not affect them. As to them the law continues in force, notwithstanding its repeal.

"In this case the relator recovered his judgment against the city on the 16th of March, 1875. * * *

"After the judgment was obtained an execution was issued to collect the amount of it, and on the 22d of March, 1875, the alternative *mandamus* was issued [see page 285, where it says the alternative writ was issued March 26, 1875,] to compel the levy of the tax of which the city now complains. It was not until after all this that the act of March 18, 1873, was repealed. The act repealing it was approved by the governor on the 23d of March, 1875, and it became a law only from the time of his approval."

After referring to a provision of the constitution which forbids retrospective legislation, Mr. Justice STRONG says, (p. 297):

"If with this be considered the declaration of the Constitution that no retrospective law, or law impairing the obligation of contracts, shall be made, the conclusion is inevitable, that the repealing act had no effect upon anything that was done before March 23, 1875. **But before that day we think the relator had acquired a vested right by his judgment and his alternative writ of mandamus to have a tax levied sufficient to pay the debt due to him from the city,—a right of which he could be deprived by no subsequent action of the legislature.**

"We do not deny that it is competent for a legislature to repeal an act, which, when it was passed was a mere gratuity, if while it was in existence no vested rights have been acquired under it or in virtue of it. But such, we think, is not this case. Indeed, there are very strong reasons for holding that the act of March 18, 1873, never was a gratuity."

After stating such reasons he proceeds (p. 298):

"But, if we are in error in this, it is still enough that by his judgment and his writ of *mandamus* he [Brown] acquired a VESTED RIGHT to have the tax collected which the writ ordered."

The facts showing the "vesting of the right" are thus stated by Mr. Justice STRONG (p. 285.)

"March 22, Brown applied for an alternative writ of *mandamus* to compel the city to pay the decree." * * * "The writ issued March 26, and on the same day the city filed an answer."

The fact was, therefore, that at the time of the passage of the repealing act of March 23, 1875, Brown had

only applied for a writ of mandamus, or at most only an alternative writ had been issued, and no return or answer had been made thereto. The alternative writ of mandamus, however, is practically only an order to show cause, and that case, therefore, had not proceeded through the same stages as ours had when the so-called " repealing act " of Arizona of March 13, 1899, was enacted, for at that time we had the decision of this Court, rendered January 3, 1899, that the relators were entitled to have their bonds funded.

One other observation was made. In the federal courts and under the legislation applicable to those courts, as is well known, it is necessary for a relator to get a judgment in order to establish his right, and the application for mandamus is simply the means of enforcing his right. The judgment, therefore, in the case of Brown against Memphis only established his claim *in personam* against the city. In a word, it only established his right. He had yet to apply for his mandamus to compel the city to levy the tax and pay the money, as required by the statutes. In the present case the validity of these bonds, and the right to have these bonds funded, were established by the act of Congress, approved June 6, 1896, and so this Court decided in the decision which it rendered January 3, 1899, and all that remains for the holders of these Pima County bonds to do, as this Court also decided, was to present their bonds to the Loan Commissioners of the Territory for funding, and this the bondholders did, and, when the funding was refused, applied for a mandamus to compel such funding, and such application for a mandamus, and the decision of this Court that such funding should take place, occurred long prior to any attempted repeal by the Territorial act of March

13, 1899. If, therefore, Brown by his judgment and application simply for an alternative mandamus acquired, as this Court in the *Memphis case, supra*, says he did, a vested right, *a fortiori*, the right of these relators was vested long prior to the Territorial repealing act of March 13, 1899.

This Court also held that the repealing act approved March 23, 1875, had no effect upon the "right" of Brown to have his mandamus proceeding carried into effect because of the savings contained in Section 49 of the Code of Tennessee above quoted, which is almost literally the same as Section 2934 of the Arizona Statute above quoted. Referring to said Section 49 of the Code of Tennessee as to the effect of the repealing statute approved March 23, 1875, Mr. Justice STRONG proceeds:

> "Thus [that is, by virtue of the said Section 49] has been established a rule for the construction of repealing statutes. If now the rule be applied to the act of March 23, 1875 [the repealing act] it is manifest that act did not affect any right that had before its passage accrued to Brown, the relator, under or by virtue of it, or any proceeding commenced by him under it. But certainly under his judgment recovered in 1875 he had a right to have a tax levied sufficient to pay it, so long as the act of 1873 remained in force, and he had the right *in virtue of that act*. So when the alternative *mandamus* was issued March 22, 1875, a proceeding was commenced under or by virtue of the statute."

We rely with confidence on the foregoing case as establishing that the Arizona repealing act of March 13, 1899, is without effect on the relators' rights on three grounds:

1. The relators' rights were vested before said repealing act was passed, and could not be destroyed or affected by the repealing act, irre-

spective of the saving provisions of Section 2934 of the Arizona statutes.

2. The relators' rights were saved by the said Section 2934, saving "any right then already existing or accrued," even if they would not be vested independently of Section 2934.
3. They were also saved by the clause in Section 2934, saving rights acquired in any pending "action or proceeding theretofore taken," *i. e.*, taken before the repealing statute was enacted.

The argument of counsel for the defendants is that the "action" or "proceeding" must have resulted in a judgment prior to the repealing statute in order that the right should be saved by said Section 2934. Obviously this cannot be the case, as such a statute would be useless, and the words "action or proceeding theretofore taken" would be wholly superfluous. Counsel for the defendants would have the Court substitute for the words "action" or "proceeding" taken prior to the repealing statute, "judgment obtained," or "proceeding completed"; but obviously no statute is needed in order to save the rights perfected in a judgment already rendered or a proceeding wholly completed.

The effect of such a statute as Section 2934 of the Arizona Statute, above quoted, has been many times passed upon. We cite one recent case in the Court of Appeals of the State of New York, *Village of Champlain vs. McCrea*, 165 N. Y., 264. The provision of the New York statute corresponding to that of the

Arizona statute above quoted is quoted by the New York Court of Appeals as follows (pp. 270, 271):

"The respondent insists that as the Village Law (Chap. 414, Laws of 1897) took effect July 1st, 1897, it was not competent for the appellant to file on the 2d day of July, 1897, the map and order under the law of 1875, as the Village Law covered the same subject and in express terms repealed chapter 181, Laws of 1875. It is further argued that in order to render these condemnation proceedings regular, the water commissioners should have filed a map and plans with the village clerk, and a certified copy of the map in the county clerk's office in pursuance of section 223 of the Village Law of 1897.

"The objection which was sustained by the Appellate Division, rests upon a misapprehension of the legal situation. **The inauguration of a water system for the Village of Champlain, having been duly instituted under the act of 1875, is entitled to be carried to a final conclusion under that statute, notwithstanding the enactment of the Village Law and the repeal by it of the law of 1875.**

"The Statutory Construction Act (Chap. 677 of the Laws of 1892) provides (§ 31) as follows: 'The repeal of a statute or part thereof shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected; and all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed' (*People ex rel. City of Buffalo v. N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 570).

"This principle of construction has been frequently applied, not only under the Statutory Construction Act, but prior thereto in repealing acts containing saving clauses (*Cameron v. N. Y. & Mount Vernon Water Co.*, 133 N. Y., 336; *Close v. Noye*, 147 N. Y., 597).

"The map and order filed on the second of July, 1897, under the act of 1875, was required to be filed in the office of the county clerk only by the provisions of section 5, and, consequently, is not open to the criticism that it should have been filed in the office of the village clerk. The map is in conformiiy to the act of 1875."

If the whole matter of refunding territorial and municipal indebtedness is not made, by the several acts of Congress, a matter beyond the power of the Territorial Legislature, nevertheless the utmost effect that can be given to the repealing act of March 13, 1899, is that it abolishes the powers of the loan commissioners to issue refunding bonds in the future or generally; but, if the said repealing act is effective to this extent, nevertheless it cannot, under the express provisions of the act of Congress of June 6, 1896, and the saving clauses in Section 2934 of the Revised Statutes of the Territory of Arizona, "affect the relator's rights as they existed at the date of the repealing act," or affect the relator's case then pending and awaiting judgment, as to which "right" and as to which "action or proceeding" the statutes as they existed at the date of the said repealing act remain in full force and effect.

The decisions cited by the learned counsel for the defendants (Ford's Brief, pp. 63–68), we find after examination, were either made in jurisdictions which had no such statute as that of Arizona, saving rights, pending actions, proceedings, etc., in case of repeal of a statute, or under statutes materially different from the Arizona statutes.

(3) There is also another conclusive reason why the attempted repeal of this statute cannot affect our right to have these funding bonds issued—namely, that our right had accrued—and we had the decision of the Supreme Court of the United States that the bonds be issued, prior to the passage of said repealing act. This right adjudicated by this Court to exist cannot be taken away by any act of the Territorial Legislature. And this is true independently of the provisions of Section 2934 of the Revised Statutes of Arizona.

That the Legislature of the Territory of Arizona has no power to pass legislation to annul or defeat a judgment of the Supreme Court of the United States or a right established by such judgment or under a pending judicial suit or proceeding, is obvious. On this point we merely call the attention of this Court to the language of Chief-Justice MARSHALL in *United States vs. Peters*, 5 Cranch, 115, where he said (p. 136):

> "If the legislatures of the several States may at will annul the judgments of the courts of the United States and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals."

See, also, on this point the case of *Memphis vs. United States, supra* (pp. 100–106).

(4) Furthermore, this so-called repealing act attempts to repeal only section one of the old Territorial funding act of 1887, and section one of the Territorial act of March 19, 1891, and does not repeal,

or attempt to repeal, the funding act of Congress of June 25, 1890, nor any other act of Congress, nor does it mention any act of Congress, and it does not even repeal or attempt to repeal, any other parts of the old Territorial funding act of 1887, and of said act of March 19, 1891, except section one of the said act of 1887, and section one of said act of March 19, 1891. Therefore, even on the defendants' own theory, all the other parts of the said funding acts of 1887, and of the said act of March 19, 1891, except only sections one thereof, stand unrepealed, and these acts, if so unrepealed. as well as the acts of Congress, leave in full force and effect sufficient provision for the issuance of these bonds, so that there is full authority for the issuance of the said bonds without looking to the said sections one of the Territorial funding act of 1887, and of the Territorial act of March 19, 1891.

Even if the view presented by the defendants—namely, that the repealing act of March 13, 1899, repealed section one of the funding act of Congress of June 25, 1890, as well as section one of the funding act of the Territory of 1887, and section one of the Territorial act of March 19, 1891, were the correct view (and it is not), still the remaining and unrepealed provisions of the said act of Congress of June 25, 1890, and the said Territorial act of 1891, and the said Act of Congress of June 6, 1896, fully authorize and require the funding of the bonds in question.

The learned counsel for the defendants erroneously assume that the terms of the said repealing act of March 13, 1899, repeal *all* of the funding act of the Territory in the Revised Statutes of Arizona of 1887, and *all* of the act of the Territory of March 19, 1891. This, however, is not the fact. The said act of 1899 does not repeal, or attempt to repeal, any part of the funding act in the Revised Statutes of Arizona of 1887, except Section 1 (2039) thereof. Said repealing act of 1899 does not even mention the funding act of Congress of June 25, 1890; and it does not repeal any part of the Territorial act of March 19, 1891, except section one.

Even if the said act of 1899 were to be regarded as repealing section one of the funding act of Congress of June 25, 1890, still all the remaining provisions of the said funding act of June 25, 1890, remain in full force and effect. Not only so, but the said repealing act, in dealing with the territorial funding act approved March 19, 1891, repeals only section one of the said act of 1891; and all the remaining provisions of the said act of 1891 remain unrepealed. Even if it be assumed that both section one of the funding act of Congress of June 25, 1890, and section one of the territorial funding act approved March 19, 1891, are repealed, there remain in the said funding act of Congress approved June 25, 1890, and in the said territorial funding act approved March 19, 1891, full powers and provisions for the funding of the bonds now in question, which is funding required by this court and by the Congressional act of June 6, 1896, which is in full force, not even attempted to be repealed. Section seven of the said territorial funding act approved March 19, 1891, is as follows:

"Any person holding bonds, warrants or other evidence of indebtedness of the Territory or any county, municipality or school district within the Territory, existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this Act at not less than their face or par value and the accrued interest at the time of exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon."

This court, in the former appeal in the present case (*Utter vs. Franklin*, 172 U. S., 416, 425), referring to this section, expressly held that it required the funding of these bonds. Furthermore, section ten of the act of Congress of June 25, 1890—and there has been no repeal or attempted repeal of this section—expressly authorized such funding, as this court expressly held on the former appeal in this case (*ibid*).

All the provisions of the act of Congress of June 25, 1890, as to the method of issuance of the bonds, signatures, place of payment, medium of payment, etc., etc., are still in full force and unrepealed.

The Territory of Arizona, the obligor in these bonds, is still in existence. The bonds to be issued are not the bonds of the loan commission, but the bonds of the Territory. The Governor, the Territorial Auditor and the Territorial Secretary are still in existence, as also the Territorial Treasurer.

There is no magic in the words "Loan Commissioners." These officers were in existence before these acts were passed, and they still remain in existence, and the calling of them "Loan Commissioners" in this section does not make them any more or any less the officers of the Territory. All that this section does is to provide that these three officers—the Governor,

Territorial Auditor and Territorial Secretary—shall be called " Loan Commissioners."

Even if section one of the act of Congress of June 25, 1890, were to be considered as repealed (and clearly it is not), still all the remaining sections of the said act of Congress approved June 25, 1890, and all the sections of the funding act of Arizona approved March 19, 1891, except section one, are in full force and unrepealed, and all of these sections must be regarded as in full force and effect, and so treated, and their provisions must be given full force and effect. Thus, section seven of the Territorial act approved March 19, 1891, expressly requires, as this court held on the former appeal in this case, that the Territorial bonds be issued in exchange for these present county bonds. This section, we say, is in full force and unrepealed, and effect must be geven to it.

If the Territorial Legislature of 1899 repealed section one of the act approved March 19, 1891, and repealed section one of the funding act of Congress approved June 25, 1890, *then it also equally left unrepealed all the other sections of the said acts*, and such a construction must be placed on them as will leave these other sections as well as all of the Act of Congress of June 6, 1896, which provides that these bonds shall be funded in full force and effect according to their terms.

The officers who are to issue these bonds are the Governor of the Territory, the Territorial Auditor and the Territorial Secretary, and also the Territorial Treasurer. As above stated, all these officers exist, and the Territory still exists. They can issue these bonds as provided in the said section seven of said Act of 1891, and in said section ten, and other sec-

tions, of the said Act of Congress of June 25, 1890, as directed by the said Act of Congress of June 6, 1896.

Such a construction should be placed upon these acts as will give full force and effect to the unrepealed sections. If section one of the act of 1887 (otherwise known as 2039, Revised Statutes of 1887), and so, also, if section one of the Act of Congress of June 25, 1890, be carefully examined, it will be seen that all that those sections do is to provide that certain officers of the Territory already in existence shall constitute a board of commissioners to be styled the "Loan Commissioners of the Territory of Arizona." These officers, namely, the Governor, the Territorial Auditor and Territorial Secretary, were in existence before the sections one were adopted, and they still continue in existence, even if it be conceded that the said section one of the funding act of 1887, or the said section one of the funding act of Congress of June 25, 1890, or both, has been repealed.

V.

The Supreme Court of the Territory was correct in holding that the interest, and all the interest, on these bonds, should be funded as well as the principal of the bonds.

The act of Congress approved June 6, 1896, expressly provides that these bonds "shall be funded *with the interest thereon which has accrued and may accrue* until funded into the lower interest bearing bonds, as provided by this act."

This act of June 6, 1896, validated these bonds and all the interest thereon, the interest already accrued and that yet to accrue, and directed that both the principal and all this interest be funded. No distinction was made by the said act of Congress between different parts of the interest which had accrued, but all of it was validated and directed to be funded. The language of the act of Congress is, "the interest thereon which has accrued and may accrue until funded." This includes all interest which had accrued on the said bonds, and the Supreme Court of the Territory rightly so held.

It is not here a question of any statute of limitations. These bonds, as this court has held, were not valid until they were validated by the said act of Congress approved June 6, 1896. Inasmuch as the said bonds and the interest thereon were then for the first time valid, and inasmuch as the statute expressly directs that the said bonds "with the interest thereon which has accrued and may accrue" shall be funded, and inasmuch as this language embraces all the interest which has accrued, without any distinction, this express provision of the act of Congress controls, and no statute of limitations has anything to do with the matter.

But even if it were to be assumed that any statute of limitations might apply, yet, inasmuch as these bonds and the interest thereon were not valid until they were validated by the act of Congress approved June 6, 1896, *no action could have been brought on the said bonds or interest until June 6, 1896.* Inasmuch, therefore, as no action could have been brought until June 6, 1896, on the said bonds and interest, no statute of limitations would begin to run

until June 6, 1896. This is on the familiar principle that the statute of limitations does not in any case begin to run until a right of action accrues. Even if, therefore, it be assumed that a statute of limitations would begin to run on June 6, 1896, still none of these bonds and no interest thereon have been outlawed, because this proceeding to have these bonds funded was begun in December, 1896, long within the period when the statute of limitations could have affected these bonds or the interest thereon.

This decision of the Supreme Court of the Territory as to funding the accrued interest on the bonds is in accordance with the decision of this court on the former appeal. When this case was here before this court said in *Utter vs. Franklin*, 172 U. S., 416:

"The petition set forth that plaintiffs were the *bona fide* holders for value of certain seven per cent. bonds and coupons issued in July, 1883, in compliance with the act of the Territory 'to promote the construction of a certain railroad,' approved February 21, 1883, aggregating, including principal *and interest thereon*, the sum of $289,964.50."

This court, after considering the case, then expressly stated at the conclusion of its opinion (p. 425):

"In addition to this, however, the act of Congress of June 6, 1896, declared that all the outstanding bonds, warrants and other evidences of indebtedness of the Territory and its municipalities shall be funded *with the interest thereon*, etc.

"We are, therefore, of opinion that it was made the duty of the loan commissioner by these acts to fund the bonds in question."

On this former appeal no distinction was made by this court as to any different parts of the accrued interest, and none can be made now. What was said by

this court in the similar case of *New Orleans vs. Warner*, 180 U. S.,199, 203, applies here:

"It should be stated, in this connection, that no such distinction between different classes of warrants, as is now made, was called to the attention of this court when the case was here upon questions certified, 167 U. S., 467, or upon the merits, 175 U. S., 120. In fact, the present exceptions to the master's report obviously involve an attempt to set up a new defense as to a part of these warrants after the merits of the case have been fully considered and disposed of. This is impossible. *Yazoo, &c., R. R. Co. v. Adams, ante*, 1; *Supervisors v. Kennicott*, 94 U. S., 498."

The decision of the Supreme Court of the Territory, requiring the funding of all the interest on these bonds is, therefore, clearly correct.

VI.

The plaintiffs can maintain this proceeding as the holders of these bonds, although they are not the beneficial owners of all the bonds in question.

It has been suggested by the learned counsel for the defendants that this mandamus proceeding cannot be maintained, because the plaintiffs in the suit are not the beneficial owners of all the bonds and coupons on which this mandamus proceeding is brought. The facts are that James L. Utter owned in his own right four of the bonds in question, and Elizabeth B. Voorhies (who was one of the original

plaintiffs in the suit, and whose executors, George Albright *et al.*, have been substituted by order of this court and the Supreme Court of the Territory, in her place) owned thirty of these bonds, and that all of the owners of the other bonds delivered their bonds and coupons (all of which are payable to bearer) to W. N. Coler & Company, to be delivered to James L. Utter and Elizabeth B. Voorhies for the express purpose of having them refunded. These bonds were all payable to bearer, and a suit could be brought on them by any person who held them. See Section 121, Revised Statutes of Arizona, 1887, p. 69:

"Any person to whom any of the said negotiable instruments may have been assigned may maintain an action in his own name which the original obligee or payee might have brought," etc.

There is no possible objection to transferring these bonds to Mr. Utter and Mrs. Voorhies (now Mrs. Voorhie's executors) for the express purpose of bringing this suit thereon. These bonds are payable to bearer, and are negotiable, and the title thereto passes by delivery. The statutes of Arizona, above quoted, expressly provide that the assignee of a negotiable instrument may sue in his own name. Furthermore, the courts in Arizona are courts of general jurisdiction so far as respects the persons who may sue therein.

This case, therefore, is precisely like the case of *Bernards Township vs. Stebbins*, 109 U. S., 341, in which case this court held that where bonds and coupons had been delivered to the plaintiff (p. 347) "*solely for the purpose of bringing suit on the coupons*," nevertheless (so far as the citizenship of the parties permitted a case to be brought in the federal court, and a question as to citizenship of parties does not arise in the

Arizona Territorial Court, for that is a court of *general* jurisdiction, so far as parties are concerned), there was no objection to such a suit being maintained by a person to whom the coupons had been transferred solely for the purpose of bringing suit thereon. On this point this court said (p. 356):

"But no valid objection has been shown to the maintenance of these bills, so far as regards those bonds of which the plaintiffs are the bearers, and which are actually owned either by themselves or by other citizens of New York or Pennsylvania to a sufficient amount by each owner to sustain the jurisdiction of the circuit court (*Thompson v. Perrine*, 106 U. S., 589; *Chickaming v. Carpenter*, 106 U. S., 663; *Douglas' Commissioners v. Bolles*, 94 U. S., 104, 109; *Cromwell v. Sac County*, 94 U. S., 351, 360)."

The very object of making such instruments payable to bearer is that they may be passed from hand to hand by delivery, so that the person in whose possession they are has a good title thereto. Furthermore, it would be putting the holders of these bonds to an unnecessary and useless expense for each and every one of these holders of bonds himself to take his particular bond down to Arizona to have it funded and to have them bring twenty or thirty different suits thereon in case the funding of these bonds were refused.

In *Commissioners of Douglas County vs. Bolles*, 94 U. S., 104, the facts in this respect are precisely like the present. They are stated by Mr. Justice STRONG as follows (p. 109):

"They [the plaintiffs] are the holders of the coupons in suit taken from those bonds, some of which they purchased without notice of any defense. The residue of those held by them are owned by other persons, *who deposited them with the plaintiffs for collection*, taking a receipt. There is no evidence when or for what consideration those other persons purchased,

and no evidence of actual notice to them or to the plaintiffs of any of the facts anterior to the issue of the bonds."

This Court held that the plaintiffs in that suit, who thus held coupons, some of which were deposited with them for collection, were entitled to maintain suit thereon. The case, therefore, is directly in point.

So, also, in *Lanier vs. Nash*, 121 U. S., 404, this Court held that a person to whom a note had been transferred (p. 410), "*so that suit can be brought by you, if necessary*," could bring suit on the said note, and such a suit would be regarded as a suit by a trustee for the benefit of the real owners of the note.

Of course a further question which was raised in this case of *Lanier vs. Nash*, that the transfer and suit might have been contrary to the act of March 3, 1875, relating to the jurisdiction of circuit courts of the United States (but which this Court held was not contrary to the act in that particular case), has no bearing on this present case, for the reason that the Supreme Court of the Territory of Arizona is a court of *general* jurisdiction, at least so far as *parties* are concerned.

See, also, *Montclair vs. Ramsdell*, 107 U. S., 147, in which this court held and stated the established doctrine that the holder of a negotiable instrument could maintain an action thereon without showing that he paid any value therefor, and that any holder of negotiable paper who had paid value therefor could transfer it to any one without receiving value therefor, and the latter could maintain an action thereon.

This question has been well stated by the United States Circuit Court of Appeals for the Sixth Circuit

in *Village of Kent vs. Dana*, 100 Federal Reporter, 56, in which case SEVERNES, District Judge, giving the opinion, said (pp. 63, 64) :

"3. Upon the question of the right of the plaintiff to bring the action we think there is no difficulty. Doubtless it was competent for the defendant to show that the savings bank had the beneficial interest in the subject of the suit in order to let in any defense which it might have as against the bank; but it had no further interest in the matter. Assuming that the savings bank delivered these coupons to Dana for the purpose of enabling him to bring suit upon them, that he gave his check therefor, and that it was understood between them that he should turn over the proceeds of the collection to the bank and take up his check—which is a construction of the evidence as favorable to the defendant as it would bear—still, this would suffice to enable him to bring the suit in his own name. His right to recover would be no larger than that of the bank. In that respect he would stand precisely in its position, and, if the bank was a *bona fide* holder, he would recover in that character. The title to negotiable paper payable to the bearer passes by delivery, unless the attendant circumstances show that such was not the intention. But here the bank transferred these coupons for the purpose of enabling him to bring suit. It is implied in that that such title should pass as would enable him to sue, for without it the object of the transfer could not be accomplished. Possession of such paper where it is payable to bearer, or where it is payable by indorsement to the holder, coupled with an authority to bring suit upon it, is sufficient for that purpose. In *Law vs. Parnell*, 7 C. B. (N. S.), 282, the action was brought in the name of an agent as custodian of paper held for another, but indorsed in blank, the agent being authorized by his principal to bring suit upon it. It was held that he had sufficient title to maintain the suit, EARLE, C. J., saying :

"'The bill being indorsed in blank, the bank had the right to hand it over to a third person to sue upon it without indorsing it; and, therefore, the plaintiff, if he was the lawful holder of the bill and had authority from the bank to do so, had a perfect right to sue upon it.'

"This case was directly approved in *O'Brien v. Smith*, 1 Black, 99; 17 L. Ed., 64; where the suit was

brought by the cashier of a bank upon a note belonging to it, but of which he had control for its use. In affirming a recovery against the objection that the plaintiff could not recover in his own name, Chief-Justice TANEY, speaking for the court, said:

"'The authorities referred to by the counsel for the defendant in error are conclusive, and it cannot be necessary to discuss these questions, which we consider as too well settled to be now open to serious controversy.'

"The case of *Boyd v. Corbitt*, 37 Mich., 52, is precisely in point. There Boyd, who was a collecting agent for one Martin, received from him a note indorsed in blank, and brought suit thereon in his own name, and it was held that he had sufficient title on which to maintain the suit.

"Where, as in Ohio, the Code of Procedure requires that the suit shall be brought by the real party in interest, it is nevertheless held that, when the plaintiff is the lawful holder of the note, it is no defense to the maker to show that the transfer under which the plaintiff holds it is without consideration or subject to equities between him and his assignor, or colorably, and merely for the purpose of collection, and that it is sufficient if he have the legal title, either by written transfer or delivery, whatever may be the equities of his relation with his assignor (*White v. Stanley*, 29 Ohio St., 423; *Eaton v. Alger*, 47 N. Y., 345; *Hays v. Hathorn*, 74 N. Y., 486; *Cottle v. Cole*, 20 Iowa, 481)."

The learned counsel for the defendants, in their brief, refer to the part taken by the firm of W. N. Coler & Company, of New York, in regard to gathering together these bonds and having them presented for funding as provided in the act of Congress of June 6, 1896. They seem to think that such conduct on the part of W. N. Coler & Company is reprehensible, for some reason or other which said counsel do not explain. On the contrary the fact is that the conduct of W. N. Coler & Company in this matter of getting these bonds refunded is deserv-

ing of praise and commendation. Said firm is and has been a reputable banking and bond-dealing house in the city of New York. That firm purchased these bonds and sold them to numerous customers of their (list of owners of these bonds, Record, pp. 104, 105). Naturally enough, when the county repudiated these bonds these same customers came back to W. N. Coler & Company, and asked their advice and assistance in the matter of having these bonds paid or funded. For the firm of W. N. Coler & Company not to have given such assistance would have been contrary both to business usage and to their moral obligations to their customers. W. N. Coler & Company, therefore, deserve praise and commendation for their action in the matter, and there is no occasion whatever for the derogatory remarks of the counsel for the defendants in respect of such action.

VII.

For the foregoing reasons the judgment of the Supreme Court of Arizona ought to be affirmed.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
WM. H. BARNES,
Counsel for Appellees.

APPENDIX.

[Revised Statutes of Arizona, 1887, pp. 410, 411.]

TITLE XLV.

MANDAMUS.

[Approved March 8, 1887.]

2335. (SEC. 1.) The writ of *mandamus* may be issued by the supreme or district court to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

2336. (SEC. 2.) This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.

2337. (SEC. 3.) The writ shall be either alternative or peremptory; the alternative writ shall state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ shall be in a similar form, except that the words requiring the party to show cause why he has not done as commanded shall be omitted, and a return day shall be inserted.

2338. (SEC. 4.) When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative shall be first issued; but if the application be upon due notice, and the writ be

allowed, the peremptory may be issued in the first instance. The notice of the application, when given, shall be at least ten days. The writ shall not be granted by default. The case shall be heard by the court, whether the adverse party appear or not.

2339. (SEC. 5.) On the return day of the alternative, or the day on which the application of the writ is noticed, or such further day as the court may allow, the party on whom the writ or notice shall have been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

2340. (Sec. 6.) If an answer be made which raises a question as to a matter of fact essential to the determination of the motion and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had and the verdict certified to the court. The question to be tried shall be distinctly stated in the order for trial, and the county shall be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained in case they find for him.

2341. (Sec. 7.) On the trial the applicant shall not be precluded by the answer of any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance.

2342. (Sec. 8.) If either party be dissatisfied with the verdict of the jury, he may move for a new trial.

2343. (Sec. 9.) If a new trial be granted, the jury shall, within five days thereafter, unless the parties agree on a longer time, be summoned to try the issue. After a second verdict in favor of the same party a new trial shall not be had.

2344. (Sec. 10.) If no motion for a new trial be made or if denied, the clerk, within five days after the rendition of the verdict or denial of the motion, shall transmit to the court in which the application for the writ is pending a certified copy of the verdict attached to the trial; after which either party may bring on the argument of the application upon reasonable notice to the adverse party.

2345. (SEC. 11.) If no answer be made, the case shall be heard on the papers of the applicant. If an answer

be made which does not raise a question such as is mentioned in section six, but only such matters as may be explained or avoided by a reply, the court may, in its discretion, grant time for replying. If the answer, or answer and reply, raise only questions of law, or put in issue immaterial statements not affecting the substantial rights of the parties, the court shall proceed to hear, or fix a day for hearing, the argument of the case.

2346. (SEC. 12.) If judgment be given for the applicant, he shall recover the damages which he shall have sustained, as found by the jury, or as may be determined by the court or referees upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate shall also be awarded without delay.

2347. (SEC. 13.) The writ shall be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court.

2348. (SEC. 14.) When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board or person, if it appear to the court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned for a period not exceeding three months, and may make any orders necessary and proper for the complete enforcement of the writ. If a fine be imposed upon a judge or officer who draws a salary from the territory or county, a certified copy of the order shall be forwarded to the territorial or county treasurer, as the case may be, and the amount thereof may be retained from the salary of such judge or officer.

[Took effect July 1, 1887.]

Act of Congress approved June 25, 1890.

[The Italics show new provisions made by Congress. The brackets show provisions in the Territorial Funding Act of 1887 which Congress did not adopt.]

An Act approving, with amendments, the funding act of Arizona (26 Stat. 175).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

That the act of the Revised Statutes of Arizona of eighteen hundred and eighty-seven, known as "Title XXXI., Funding," be, and is hereby amended so as to read as follows, and that as amended the same is hereby approved and confirmed, subject to future Territorial legislation:

"TITLE XXXI.—FUNDING *AND LOAN.*

"Chapter One.

"TERRITORIAL, *County, Municipal, and School District* INDEBTEDNESS.

"Par. 2039 (Sec. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona *and such future indebtedness as may be or is now authorized by law*, the governor of the said Territory, together with the Territorial auditor and Territorial secretary and their successors in office, shall constitute a board of commissioners, to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

"Par. 2040 (Sec. 2.) It shall be, and is hereby, declared the duty of the loan commissioners to provide for the payment of the existing Territorial indebtedness due, and to become due, *or that is now, or may be hereafter, authorized by law* and for the purpose of paying, redeeming,

and refunding all or any part of the principal and interest, or either of the existing and subsisting Territorial legal indebtedness, and also that which may at any time become due *or is now or may be hereafter authorized by law*, the said commissioners shall, from time to time, issue negotiable coupon bonds of this Territory, when the same can be done at a lower rate of interest and to the profit and benefit of the Territory.

"Par. 2041 (Sec. 3). Said bonds shall be issued as near as practicable in denominations of one thousand dollars, but bonds of a lower denomination, not less than two hundred and fifty dollars, may be issued when necessary. Said bonds shall bear interest at a rate to be fixed by said loan commissioners, but in no case to exceed *five* [six and one-half, (6½)] per centum per annum, which interest shall be paid in gold coin, or its equivalent in lawful money of the United States, on the fifteenth day of January in each year, at the office of the Territorial treasurer, or at such bank in the city of New York, in the State of New York, or in the city of San Francisco, in the State of California, *or such place* as may be designated by the said loan commissioners, at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States *fifty* [within twenty-five] years after the date of their issue. *Said Territory reserves the right to redeem at par any of said bonds, in their numerical order, at any time after twenty years after the date thereof.*

"They shall bear the date of their issue, state when, where, and to whom payable, rate of interest, and when and where payable, and shall be signed by said loan commissioners, and shall have the seal of the Territory affixed thereto, and countersigned by the Territorial treasurer, and bear his official seal, and shall be registered by the Territorial auditor in a book to be kept by him for *the* [that] purpose, *which shall state amount sold for, or, if exchanged, for what;* and the faith and credit of the Territory is hereby pledged for the payment of said bonds and the interest accruing thereon, as herein provided.

"Par. 2042 (Sec. 4). Coupons for the interest shall be attached to each bond, so that they may be removed without injury to or mutilation of bond.

"They shall be consecutively numbered and bear the same number of the bond to which they are at-

tached, and shall be signed by the Territorial treasurer.

"The said coupons shall cover the interest expressed in said bond from the date of issue until paid; but in no case shall bonds bear interest, nor shall any interest be paid thereon for any time before their delivery to the purchaser, as hereinafter provided.

"Par. 2043 (Sec. 5). Whenever the said loan commissioners *may be authorized by law to issue bonds*, or shall have decided to refund or redeem all or any part of the existing indebtedness of this Territory, they shall direct the Territorial treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published for the period of one month in some daily newspaper published at the capital of the Territory, and at least one insertion in a newspaper published in the city of New York, in the State of New York, and in the city of San Francisco, in the State of California; such notice shall specify the amount of bonds to be sold, [the rate of interest they shall bear] the place, day and hour of sale, and that bids will be received by said treasurer for the purchase of said bonds within one month from the expiration of said publication; and at the place and time named in said notice, the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof to the [highest] bidder or bidders therefor *bidding the lowest rate of interest: Provided*, That said loan commissioners shall have the right to reject any and all bids: *And Provided Further*, That they may refuse to make any award unless sufficient security shall be furnished by the bidder or bidders for the compliance with the terms of their bids.

"Par. 2044. (Sec. 6.) When *the* [a] sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds as in this act provided, and any expense incurred by them therefor, for the publication of said notices, costs of remitting funds for the payment of interest or money on said bonds, and all other necessary incidental expenses under the provisions of this act, shall be paid out of the general fund of said Territory, upon the order of the Territorial auditor, *countersigned by the governor*; and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund.

"They shall from time to time, after signing said bonds, deliver them to the Territorial treasurer, taking his receipt therefor, and charge him therewith. The said treasurer shall give to the territory of Arizona an additional official bond, with two or more sureties, in a sum equal to the amount of bonds [issued under this act] delivered to him by the said loan commissioners, which bond shall be approved by the governor and deposited and filed with the secretary of the Territory and recorded by him in a book to be kept for that purpose. And the said treasurer shall stand charged upon his official bond for the faithful performance of the duties required of him under this act.

" Par. 2045 (Sec. 7). The Territorial treasurer shall sell said bonds for cash or exchange them for any of the [Territorial] indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any [Territorial] indebtedness be redeemed at more than its face value and any interest that may be due thereon.

" *That* [The] said treasurer shall endorse, by writing or stamping in ink on the face of the paper evidencing the indebtedness received by him in exchange for said bonds, the time when and the amount for which exchanged.

" Par. 2046 (Sec. 8). [All] Moneys [so] received by said treasurer [from a sale of such bonds] shall be applied by him [exclusively] to the redemption of the [Territorial] indebtedness for the redemption of which [such] bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of Territorial warrants of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease.

"*Before any such indebtedness shall be paid the Territorial auditor shall indorse on each certificate the amount due thereon, and shall write across the face of each the date of its surrender and the name of the person surrendering, and shall keep proper record therof.*

" Par. 2047 (Sec. 9). There shall be levied annually upon the taxable property in this Territory, and in addition to the levy for other authorized taxes a sufficient sum to pay the interest on all bonds issued and disposed of in pursuance of the provisions of this Act

to be placed *in the Territorial treasury in the* [by the Territorial Treasurer in a] fund to be known as the 'Interest Fund.' And *fifty* [ten] years after such bonds shall have been issued such additional amount shall be levied annually as will pay ten per cent. of the total amount issued until all the bonds issued under the provisions of this act are paid and discharged; *nothing herein contained shall be construed to prevent the legisature of Arizona from creating a sinking fund during the life of said bonds for their redemption at maturity.*

"The Territorial board of equalization, *or, on their failure,* [if there be one, if not, then] the Territorial auditor, shall determine the rate of tax to be levied in the different counties in the Territory to carry out the provisions of this act, and shall certify the same to the 'board of supervisors' in each county *and to the municipal or school authorities;* and the said board of supervisors *or authorities* are hereby directed and required to enter such rate on *their* [the] assessment *rolls* [roll of their respective counties] in the same manner and with the same effect as is provided by law in relation to other Territorial, [and] county, *municipal and school* taxes. Every tax levied under the provisions *of* [or] authority of this act is hereby made a lien against the property assessed, which lien shall attach on the first Monday in March in each year, and shall not be satisfied or removed until such tax has been paid.

"All moneys derived from taxes authorized by [the] provisions of this act shall be paid into the Territorial treasury and shall be applied—

"FIRST. To the payment of the interest on the bonds issued hereunder.

"SECOND. To the payment of the principal of such bonds: *Provided,* That all moneys remaining in the interest fund after the payment of the interest [in each year, for the first ten years after the issuance of any bonds under this act,] and all moneys remaining in the 'redemption fund' after all said bonds shall have been paid and discharged shall be transferred by the Territorial treasurer to the Territorial 'general fund.'

"Par. 2048 (Sec. 10). Whenever, after the expiration of the *fifty* [ten] years from the date of issuance of any bonds under this act there remains after the payment of the interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the

duty of the Territorial treasurer to advertise as in *the manner of* [manner of the] advertising by the loan commissioners for bids for sale of bonds, which advertisement shall state the amount of money in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which such fund is set apart to pay and discharge; and if such bonds so numbered in such advertisement shall not be presented for payment and cancellation at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the Territorial auditor, who shall indorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The Territorial auditor shall keep a record of all bonds issued and disposed of by the Territorial treasurer, showing their number, rate of interest, date, and amount of sale, when, where, and to whom payable, and if exchanged, for what, and when presented for redemption, the date, amount due thereon, and person surrendering.

"*The boards of supervisers of the counties, the municipal and school authorities, are hereby authorized and directed to report to the loan commissioners of the Territory their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the municipal or school authorities, of their bonded and outstanding indebtedness, and said loan commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness, upon the official demand of said authorities, in the same manner as other Territorial indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may be hereafter allowed by law to said county, municipality or school district, upon official demand by said authorities; the county, municipality or school district to pay into the Territorial treasury, in additional to all other taxes authorized by law, such amounts as may be directed by the Territorial board of equalization, or on their failure by the Territorial auditor to be levied for the payment of the principal of the bonds issued in redemption, refunding or*

other bonds issued to such county, municipality or school district when the same shall become due and in addition a rate of interest paid by the Territory on such bonds.

" Par. 2049 (Sec. 11). When the treasurer pays or redeems any [Territorial] indebtedness he shall indorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words 'redeemed and canceled,' with the date of cancellation. He shall keep a full and particular account and record of all his proceedings under *the* [this] act and of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings under this act with his annual report, to be by the governor laid before the legislature at its meeting. All books and papers pertaining to the matter provided in this act shall at all times be open to the inspection of the party interested, or *to* the governor, or a committee of either branch of the legislature, or a joint committee of both.

" Par. 2050 (Sec. 12). It shall be the duty of the Territorial treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient; and if said fund be not sufficient, then to pay the deficiency out of the general fund: *Provided*, That the Territorial auditor shall first draw his warrant on the Territorial treasurer, payable to the order of said treasurer, for the amount of such deficiency, out of the general fund [which said interest warrant shall be drawn at least one month previous to the maturing of the interest].

" Par. 2051 (Sec. 13). It shall be the duty of said [board of] loan commissioners to make a full report of all their proceedings had under the provisions of this act to the governor on or before the first day of January of each year, and said reports shall be transmitted by the governor to the Territorial legislative assembly.

" Par. 2052 (Sec. 14). No bond issued under the provisions of this act shall be taxed within this Territory.

" Sec. 15. *That nothing in this act shall be construed to authorize any future increase of any indebtedness in excess of the limit prescribed by the 'Harrison act': Provided, however, That the present existing and outstanding indebtedness, together with such warrants as may be issued for the necessary and current expenses of carrying on Territorial, county, municipal and school*

government for the year ending December thirty-first, eighteen hundred and ninety, may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates or other evidences of indebtedness shall be allowed to issue or be legal where the same is in excess of the limit prescribed by the 'Harrison Act.'

That all acts or parts of acts in conflict with this act are hereby repealed.

Approved June 25, 1890.

The Validating and Funding Act of Congress of June 6, 1896 (29 Stats., 262).

"*An Act amending and extending the provisions of an Act of Congress, entitled 'An Act approving with amendments the funding Act of Arizona,' approved June 25, 1890, and the act amendatory thereof and supplemental thereto, approved August 3, 1894,*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of the Acts of Congress approved June 25th, 1890, and August 3rd, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities and school districts thereof, as provided in the Act of Congress approved June 25th, 1890, until January 1st, 1897, and all outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities and school districts thereof, heretofore authorized by legislative enactments of said Territory bearing a higher rate of interest than is authorized by the aforesaid funding Act approved June 25th, 1890, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds as provided by this Act.

"SEC. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the Act of Congress

approved June 25th, 1890, and the Act amendatory thereof and supplemental thereto approved August 3rd, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory as hereinbefore authorized to be funded are hereby confirmed, approved and validated, and may be funded as in this Act provided until January 1st, 1897: *Provided*, That nothing in this Act shall be so construed as to make the Government of the United States liable or responsible for the payment of any of said bonds, warrants or other evidences of indebtedness by this Act approved, confirmed and made valid, and authorized to be funded.

"Approved June 6, 1896."

Brief in this case on [illegible] appeal
to [illegible]

upreme Court of the United States.

OCTOBER TERM, 1902.

Filed Mar. 1, 1902.

James L. Utter and Elizabeth B. Voorhies, *Appellants,*

against

. Franklin, Governor; C. P. Leitch, Auditor; and C. M. Bruce, Secretary, Loan Commissioners of the Territory of Arizona.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANTS.

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Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 94.

JAMES L. UTTER and ELIZABETH B. VOORHIES,
Appellants,

AGAINST

B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor; and C. M. BRUCE, Secretary, Loan Commissioners of the Territory of Arizona.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal from a judgment of the Supreme Court of the Territory of Arizona, denying the petition of the appellants for a writ of mandamus (Record, p. 10). The proceedings in this case were begun in the Supreme Court of the Territory of Arizona by the

plaintiffs filing in said court, December 31, 1896, their petition for said writ in the manner provided by the Code of Arizona (Record, pp. 1–7).

THIS PETITION, and Exhibit A thereto attached and made a part thereof, set forth the facts as to the issue of certain bonds by the County of Pima, and that the plaintiffs are now the owners of the said bonds, having purchased them for value in the open market. The plaintiffs state in their petition that by law it is the duty of the defendants the Loan Commissioners of the Territory of Arizona under the Acts of Congress in that behalf and the Territorial Act of March 19, 1891, to issue to the plaintiffs on demand the funding bonds of the Territory of Arizona in exchange for the said Pima County bonds. Exhibit A, attached to the said petition (Record, pp. 4–7), is a copy of the written demand which the plaintiffs made upon the said Loan Commissioners, December 14, 1896. The petition for writ of mandamus states that at the time of the filing of said petition—December 31, 1896—the defendants, said Loan Commissioners, had failed and refused to comply with the said written demand; that the plaintiffs have no other remedy to obtain the issue of the said refunding bonds, and therefore they ask the Supreme Court of the Territory of Arizona for a writ of mandamus, addressed to the said Loan Commissioners, commanding them to issue the bonds of the Territory of Arizona in exchange for the said Pima County bonds held by petitioners.

The defendants filed an answer to the said petition for a writ of mandamus (Record, p. 7), in which answer they in substance except to the sufficiency of the said petition, and demur thereto on the alleged ground

that the said petition fails to state facts sufficient to constitute a cause of action, and set up as a defense that the said Pima County bonds had been adjudged to be invalid, and that this judgment had been affirmed on appeal by the Supreme Court of the United States (Decision reported, *Lewis vs. Pima County*, 155 U. S., 54).

The plaintiffs demurred to the said answer (Record, pp. 8, 9).

It thus appears that the questions presented on the record are questions of law. The cause was submitted on the two demurrers (Record, pp. 9, 10). The Supreme Court of the Territory gave judgment, denying the writ of mandamus (Record, pp. 9, 10).

The court did not state nor does the record show whether the Court gave judgment on the demurrer to the petition for the writ of mandamus, which statement, if it had been made, might have implied that, notwithstanding the facts stated in the petition, and notwithstanding the validity of the Pima County bonds, there was no right to have them refunded. Neither did the court state that it gave judgment on the demurrer to the answer or return to the writ, which statement, if it had been made, might have implied that the court refused the mandamus because it believed the Pima County bonds themselves invalid. The only judgment was simply one denying the petition for mandamus (Record, p. 10). The court did not render any opinion, and it is impossible to state on which of these two grounds it rendered its decision.

An appeal to this Court was thereupon taken by the plaintiffs, and allowed by the Supreme Court of Arizona (Record, p. 10), and the appeal was perfected in regular course (Record, pp. 10–14).

Assignment of Errors.

(Record, p. 11.)

First. That the Court erred in holding that the petition did not state facts sufficient to sustain the remedy asked for.

Second. That the Court erred in denying the mandamus asked for.

Third. That the Court erred in sustaining the demurrer to the petition in said cause.

Fourth. That the Court erred in refusing to sustain the demurrer to the special defense set up in bar in the answer of respondents.

Argument.

An order granting or refusing a writ of mandamus is a "final judgment" appealable to this Court.

Davies vs. Corbin, 112 U. S., 36.
Riggs vs. Johnson County, 6 Wall., 166.

In order to understand this case it is necessary to examine in chronological order the various Acts of Congress and of the legislature of the Territory of Arizona relating to the matter in controversy and the history of those acts, and then examine the facts as to these Pima County bonds and ascertain the exact relation between the said legislation and legislative history and the said bonds.

We admit, and our argument assumes that this Court in the case of *Lewis vs. Pima County*, 155 U. S., 54, A. D. 1894, held invalid certain matured coupons from the very bonds which are now owned by the plaintiffs and which form the subject matter of this suit. That decision will no doubt be urged here by the defendants, as it was urged by them in the Supreme Court of Arizona as the answer to the petition for mandamus. To this argument we reply that these Pima County bonds had been validated by act of the Congress of the United States since the decision of this Court in the case of *Lewis vs. Pima County* and before the institution of these mandamus proceedings. The defendants also urged in the court below as a matter of law that, even if the bonds had been validated, the duty of the Loan Commissioners to fund them was not mandatory. To this latter argument we of course reply that the act of Congress of June 6, 1896, and the Act of the Territory of Arizona

of March 19, 1891, make this duty of the Loan Commissioners mandatory, and give the plaintiffs as the holders of these bonds the right to exchange them for funding bonds of the Territory. This in general is a brief outline of the questions which are presented to this court.

With this preface we proceed now to state the acts of Congress and of the Territory which relate to the matter under consideration and their legislative history and the relation of the same to these Pima County bonds.

The bonds in question in this case of date July 1, 1883, were issued under an act of the legislature of the Territory of Arizona, entitled, "An act to promote the construction of a certain railroad," approved by the Governor February 21, 1883 (Record, p. 4). The said act is printed at length in the Appendix to this brief *(Post,* p. 61*)*. This court in the case of *Lewis vs. Pima County,* 155 U. S., 54, A. D. 1894, held certain coupons from the bonds in question invalid on the ground that the said act of the legislature of the Territory of Arizona of February 21, 1883, was invalid as being contrary to an act of Congress, entitled, "An act explanatory of section 1889 of the Revised Statutes of the United States, and to ratify and confirm certain territorial legislation, and for other purposes," approved June 8, 1878. The said act of June 8, 1878 (20 Stats., 101), is printed in full in the Appendix to this brief *(Post,* p. 60*)*.

While we do not need, in order to establish our present case, to question the correctness of the decision of this court in said case of *Lewis vs. Pima*

County, yet we deem it proper respectfully to refer to that decision as a part of the history of the case now under consideration to aid in arriving at a correct understanding of the whole matter and of the case presented on the present record. We make this reference with less hesitation owing to the fact that the ground upon which the *Lewis Case* was decided in this court seems *not to have been referred to or discussed in the briefs and arguments of counsel* in this court, and because a careful examination of the legislation of Congress and of the history of such legislation has convinced us that, if the legislation and facts bearing on the point on which the case was decided had been fully presented and argued by the counsel in that case in this court, or had otherwise come to the attention of this court, a different conclusion must have been reached.

Act of Congress of June 8, 1878, considered and shown not to prohibit territorial legislatures from authorizing railroad aid bonds by Counties.

We proceed to examine the said act of June 8, 1878 (20 Stat., 101), reprinted in full in the Appendix to this brief (*post*, p. 60). The clause in this act on which, and on which alone, this court decided the case of *Lewis vs. Pima County*, 155 U. S., 54, was as follows:

"But nothing herein shall have the effect to create any private right except that of holding and executing municipal offices, or to divest any such right, or to make valid or invalid any contract or obligation heretofore made by or on behalf of any such town, city or other municipal corporation, or to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs."

Note that this language contains no prohibition upon the legislatures of the Territories. It simply provides that "nothing **herein** [that is, in this act of Congress of June 8, 1878] shall have the effect * * * to **authorize** any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs." Clearly, this is not a prohibition upon the legislatures of any of the Territories. This clause in the act of Congress of June 8, 1878, left the matters therein mentioned to be dealt with by the territorial legislatures themselves, subject, of course, to any supervisory control of such legislation by any future act of Congress; but there is nothing in this act in and of itself to take away or in any manner restrain the power of the legislatures of the Territories to enact any legislation as to any county, city or town incurring any debt or obligation.

Under the organic act of the Territory of Arizona (12 Stat., 664), which, by reference, makes part thereof the organic act of the Territory of New Mexico (9 Stat., 446), and under the Revised Statutes of the United States (Sec. 1851), the legislative power of the Territory of Arizona extends "to all righful subjects of legislation not inconsistent with the Constitution and laws of the United States." The provisions of the organic act of the Territory of Arizona and of the Revised Statutes of United States are as follows:

The Organic Act of the Territory of Arizona of February 24, 1863 (12 Stat., 664), provides:

"SEC. 2. That the government hereby authorized shall consist of an executive, legislative and judicial power. * * * The legislative power shall consist of a council of nine members and a house of representatives of eighteen. * * * The powers, duties

and the compensation of the governor, legislative assembly * * * shall be such as are conferred upon the same officers by the act organizing the territorial government of New Mexico."

The Organic Act of New Mexico (9 Stat., 446) provides:

SECTION 5. "That the legislative power and authority of said territory shall be vested in the governor and a legislative assembly."

SECTION 7. "That the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act."

The Revised Statutes of the United States provide as follows:

SECTION 1846. "The legislative power in each Territory shall be vested in the governor and a legislative assembly."

SECTION 1851. "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."

At the time of the passage of the act of February 21, 1883, by the Legislature of the Territory of Arizona authorizing the issue of bonds of Pima County, there was no restriction upon the general legislative power of the Territory of Arizona, or of other Territories, against their authorizing the issuing of railroad aid bonds. The said act of February 21, 1883, was never disapproved by Congress; nor were the other and numerous similar Territorial Acts authorizing railroad aid bonds. Such restraint upon the issue of railroad aid bonds did not, as we shall see, come until a later date, and in a later act of Congress, namely, in the act of July 30th, 1886 (24 Stat. 170), commonly called the "Harrison

act," where this matter was dealt with and a prohibition placed upon the legislatures of the Territories. *Note also that this very act of June 8, 1878, itself expressly recognizes the general legislative power of the legislative assemblies of the Territories as continuing to exist in relation to the subject matters referred to in said act of June 8, 1878;* for this statute expressly provides that " all general and special acts of such legislative assemblies heretofore passed, creating and providing for the government of towns, cities and other municipal corporations, and conferring such rights, powers and privileges upon the same as were necessary to their local administration, be and the same are hereby ratified, confirmed and declared to be valid, any law to the contrary notwithstanding; *subject, however, to amendment or repeal hereafter by such legislative assemblies.*" Note that all this legislation here referred to is subject to amendment or repeal hereafter by such legislative assemblies.

Note also the perfectly *neutral* character of the language in the same sentence which contains the language which this court held in *Lewis vs. Pima County* invalidated the coupons from the Pima County bonds there in question. The language is: " But nothing herein shall have the effect * * * to make *valid or invalid* any contract or obligation heretofore made by or on behalf of any such town, city or other municipal corporation." This clause clearly left to the legislative assembly of the Territory the power to deal with this subject matter as being under its general legislative power. In other words, with any contracts or obligations *theretofore* made by any town, city or other municipal corporations the act of Congress of June 8, 1878, did not attempt to deal; but left this matter to

the legislative assemblies of the Territories. It did so under the language, "But nothing herein shall have the effect," &c. So also as to any such contracts or obligations *in the future* by the same language: "But nothing *herein* shall have the effect * * * to *authorize* any such corporation to incur hereafter any debt or obligation," &c.—it left to the legislative assemblies of the Territories the matter of authorizing debts or obligations in the future. The Congress of the United States had not at that time come to deal directly with the question of the wisdom and expediency of limiting the Territorial legislatures as to their power to authorize municipal corporations to incur indebtedness, and did not attempt to deal with such subject until the passage of the "Harrison act" of July 30, 1886, hereinafter referred to.

Act of Congress, June 8, 1878, a Curative Act.

This act of Congress of June 8, 1878, (reprinted in Appendix to this brief) was on its face clearly designed as *a healing or curative act;* and *so far as it was not a healing or curative act its language was, and was intended to be, perfectly neutral,* leaving the matter of positive legislation to the legislative assemblies of the Territories unfettered by any of its provisions. Section 1889 of the Revised Statutes of the United States, in force when the act of June 8, 1878, was passed, was as follows:

§ 1889. "The legislative assemblies of the several Territories shall not grant private charters or especial privileges, but they may by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing and other

industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any benevolent, charitable or scientific association."

Prior to the act of June 8, 1878, it may have been suggested that some of the language of this section, to wit, "The legislative assemblies of the several Territories shall not grant private charters or special privileges, but they may by general incorporation acts permit persons to associate themselves together as bodies corporate," &c. (which clearly referred and was intended to refer only to the organization of private corporations), placed a limitation upon the legislative assemblies of the Territories so far as the creation and government of *towns, cities and other municipal corporations* were concerned. The object of passing the act of June 8, 1878, was, as shown in the title and on the very face of the Act itself, to remove any possible ground for such suggestion. As the legislative assemblies of the Territories had prior to June 8, 1878, assumed that no such prohibition existed, and had passed numerous general and special acts for the government of towns, cities and other municipal corporations, Congress, in recognizing the continued existence of the legislative power of the legislative assemblies of the Territories, validated all such acts, and as to the future left the matter of legislation for the discretion of the Territorial legislatures, merely providing that "nothing *herein*" (that is, in the act of June 8, 1878) should in and of itself and without any such future territorial legislation have the effect directly to "*authorize*" the towns, cities or other municipal corporations to incur any debt. This clause, "nothing herein," &c., so far from restraining the power

of the legislatures of the Territories, neither mentions the legislatures nor in way refers to them or to their power. The whole subject therefore was open to future territorial legislation.

Section 1889, *supra*, was not the source of territorial legislative power. And the act of June 8, 1878, is simply explanatory of Section 1889, and does not touch upon or deal with the question of the extent of territorial legislative power under the Organic Act.

If Congress had intended in this act of June 8, 1878, to place any restriction upon the power of the legislative assemblies of the Territories, or to prohibit them from authorizing any such corporation to incur debts, it would have been as natural as it would have been easy for Congress so to provide, as it did later in the Harrison Act. The language would then have been somewhat as follows :

" *And hereafter the Legislature of any Territory shall not authorize any such corporation to incur hereafter any debt*," *&c.;* whereas the language that Congress used is that " nothing *herein* (that is, in the act of June 8, 1878) shall have the effect * * * to *authorize*." It makes no prohibition whatever upon the town, city or other municipal corporation, and it does not even mention the legislature or legislative power of the Territory. It does not repeal or disapprove of any of the many Territorial Railroad Aid Acts and it does not deal with that subject ot all. Its restrictive title, as well as the language of the text of the Act itself, shows that it had no purpose to restrict the legislative power of the Territories as it existed under the Organic Act.

Such was the status of the legislation of Congress at the time the Territorial act of February 21, 1883,

authorizing the issue of bonds by Pima County, was passed by the legislature of the Territory of Arizona. (Said Act of February 21, 1883, is reprinted at large in the Appendix hereto, *Post*, p. 61.) At that time the legislature of the Territory of Arizona had full power, under the organic act of the Territory and the general acts of Congress, to legislate on the subject contained in the said act. The act of Congress of June 8, 1878, contains no prohibition upon its authority to pass the act in question. The bonds were issued pursuant to the act and afterwards sold in the open market and purchased by the plaintiffs (Record, p. 2).

Numerous other Acts of Territorial Legislatures were passed (after the said Act of Congress of June 8, 1878) expressly authorizing the issue of railroad aid bonds by counties and other municipalities (see list in Appendix to this brief). Congress did not in any instance disapprove such acts; nor did Congress disapprove said Act of February 21, 1883, which authorized the Pima County bonds now in question.

We print in the Appendix to this brief a list of such other Acts of Territorial legislatures authorizing railroad aid bonds. This legislation shows what practical construction was placed upon the existing Acts of Congress (including said Act of June 8, 1878) by the Territories themselves. They evidently had no idea that said Act of June 8, 1878, contained any such prohibition as was decided in the *Pima County Case*.

"Harrison Act," July 30, 1886, first time any prohibition or limit was placed by Congress upon Territorial legislatures authorizing issue of railroad aid bonds.

Afterwards Congress passed what is commonly called the "Harrison act," entitled "An act to prohibit the passage of local or special laws in Territories of the United States, to limit Territorial indebtedness, and for other purposes," approved July 30, 1886 (24 Stat., 170). This act expressly provides (sec. 2):

"That no territory of the United States now or hereafter to be organized, or any political or municipal corporation, or subdivision of any such territory, shall hereafter make any subscription to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association, or borrow any money for the use of any such company or association."

This, we respectfully submit, is the first time that Congress ever prohibited the legislatures of the Territories from authorizing municipal corporations to aid in the construction of railroads by issuing their bonds for that purpose.

If the *Pima County Case* was rightly decided, the said Act of June 8, 1878, above discussed contained such a prohibition, and the above prohibition in the "Harrison Act" was surplusage. No! The Harrison Act was the *first* prohibition to the territorial legislatures to authorize municipal aid to railroads.

This accords with the general understanding as is shown by the fact that the legislatures of several of the Territories had, both before and after the said act of June 8, 1878, passed numerous statutes authorizing the

issue of railroad aid bonds by counties and other political subdivisions of such Territories, and also shown by the printed report made by the Senate Committee of which Senator HARRISON was chairman, at the time the Harrison act was passed. Parts of this report are printed in the Appendix to this brief *(Post*, p. 56*)*. In view of this general understanding, and in view of the acts which had been passed by the legislatures of many of the Territories authorizing the issue of railroad aid bonds and the issue of such bonds, it is perhaps not too much to say that the decision of this Court in *Lewis vs. Pima County* was a surprise to the legislatures and to the members of the profession who had occasion to consider and deal with the matter.

Legislative History of "Harrison Act" of Congress of July 30, 1886.

We proceed to give the history of this act of July 30, 1886, and to show that Congress in enacting it treated all indebtedness of the Territories and of the counties and other political subdivisions of the Territories *down to that time as valid, including indebtedness incurred by the issue of railroad aid bonds* as well as all other forms of indebtedness.

The bill for the act of July 30, 1886, was introduced into the House of Representatives by MR. SPRINGER, of Illinois (Congressional Record, vol. 17, pt. 1, p. 1043). The bill so introduced is printed in volume 17, part 4, page 4062, and is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the legislatures of the Territories of the United States now or hereafter to be organized

shall not pass local or special laws in any of the following enumerated cases, that is to say:

Granting divorces.

Changing the names of persons or places.

Laying out, opening, altering, and working roads or highways.

Regulating the jurisdiction and duties of justices of the peace, police magistrates, and constables.

Providing for changes of venue in civil and criminal cases.

Incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village.

Providing for the election of members of the board of supervisors in townships, incorporated towns, or cities.

Summoning and impaneling grand or petit jurors.

Providing for the management of common schools.

Regulating the rate of interest on money.

The opening and conducting of any election or designating the place of voting.

The sale or mortgage of real estate belonging to minors or others under disability.

The protection of game or fish.

Chartering or licensing ferries or toll bridges.

Remitting fines, penalties or forfeitures.

Creating, increasing, or decreasing fees, percentage, or allowances of public officers during the term for which said officers are elected or appointed.

Changing the law of descent.

Granting to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for such purpose.

Granting to any corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever.

In all other cases where a general law can be made applicable, no special law shall be enacted in any of the Territories of the United States by the Territorial legislatures thereof.

Sec. 2. That it shall be the duty of the legislative assemblies of the several Territories to pass such general laws as may be necessary for the government of their respective Territories not inconsistent with acts of Congress or the constitution of the United States.

Sec. 3. That all acts and parts of acts hereafter passed by any Territorial legislature in conflict with the provisions of this act shall be null and void.

This bill was read three times and passed by the House, and went to the Senate and was there read twice and referred to the Committee on the Territories (Cong. Rec., vol. 17, pt. 4, p. 4094). The bill was reported June 15, 1886, by Senator HARRISON from the Committee on Territories with amendments, and a report thereon accompanied the same, which report was ordered printed. We have obtained a copy of this report and print parts of the same in the Appendix to this brief. To that report was annexed an appendix containing letters and statistics furnished by the Governors of the several Territories to Senator HARRISON as chairman of the Senate Committee on Territories. These letters and statistics show indebtedness of the Territories and of the counties and municipalities therein incurred for various purposes, among others *indebtedness incurred by the issue of railroad bonds.* We quote, for example, from the statistics regarding the Territory of New Mexico:

Grant County railroad aid bonds	$57,000
Municipal indebtedness, railroad bonds	46,800
Santa Fe County, railroad bonds	150,000

The Governor of the Territory of Washington states in his letter: "The bonded indebtedness of Thurston County was incurred in aid of railroad construction." The accompanying table shows that the amount thereof was $75,000.

When we come to the TERRITORY OF ARIZONA we find, among other items of indebtedness, "Bonded indebtedness January 1, 1885, Pima County, $204,750." **This amount included the very bonds involved in this suit.** So, also, the bonded indebtedness of Yavapai County is stated as $169,000, and that of Maricopa County is stated as $100,000, both of such amounts

including bonds issued in aid of railroads under express statute authority given by the legislative assembly of the Territory of Arizona (*Post*, p. 65).

The Senate Committee, therefore, in reporting with amendments the bill introduced into the House by Mr. SPRINGER, proposed to *deal with the debt situation as it actually existed in the Territories.* This appears clearly from their report above quoted. They did not propose to interfere with what had been done in the past under Territorial legislation; but, on the contrary, to recognize such Territorial legislation and any indebtedness already incurred thereunder as valid. But what they did seek to do was to enact a statute in the nature of a constitutional limitation upon Territorial legislative power in the future. To this end, as they stated in their report, they made several important amendments to the bill introduced into the House by Mr. SPRINGER. These amendments were made by adding the following sections, to wit:

"SEC. 2. That no Territory of the United States now or hereafter to be organized, or any political or municipal corporation or sub-division of any such Territory, shall hereafter make any subscription to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association, or borrow any money for the use of any such company or association.

"SEC. 3. That no law of any Territorial legislature shall authorize any debt to be contracted by or on behalf of such Territory except in the following cases: To meet a casual deficit in the revenues, to pay the interest upon the Territorial debt, to suppress insurrections, or to provide for the public defense, except that in addition to any indebtedness created for such purposes, the legislature may authorize a loan for the erection of penal, charitable or educational institutions for such Territory, if the total indebtedness of the Territory is not thereby made to exceed one per

centum upon the assessed value of the taxable property in such Territory as shown by the last general assessment for taxation. And nothing in this act shall be construed to prohibit the refunding of any existing indebtedness of such Territory or of any political or municipal corporation, county, or other sub-division therein.

"SEC. 4. That no political or municipal corporation, county, or other subdivision in any of the Territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county, or subdivision, to be ascertained by the last assessment for Territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void.

"SEC. 5. That section eighteen hundred and eighty-nine, title twenty-three, of the Revised Statutes of the United States be amended to read as follows:

"'The legislative assemblies of the several Territories shall not grant private charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, and for conducting the business of insurance, banks of discount and deposit (but not of issue) loan, trust, and guarantee associations, and for the construction or operation of rail-roads, wagon-roads, irrigating ditches, and the colonization and improvements of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association.'

"SEC. 6. That nothing in this act contained shall be construed to abridge the power of Congress to annul any law passed by a Territorial legislature, or to modify any existing law of Congress requiring in any case that the laws of any Territory shall be submitted to Congress."

The amendments proposed by the Senate Committee on Territories were adopted by the Senate (Cong. Rec., vol. 17, pt. 6, p. 5825), and the Senate requested a conference with the House. These Senate amendments

did not enact Section 4 in its present form, but only the first half of said section, to wit :

" That no political or municipal corporation, county or other subdivision in any of the Territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county or subdivision, to be ascertained by the last assessment for Territorial and county taxes previous to the incurring of such indebtedness ; and all bonds or obligations in excess of such amount given by such corporation shall be void."

The House referred the bill with amendments of the Senate to the Committee on Territories and ordered the amendments printed (Cong. Rec., vol. 17, pt. 6, p. 6014). Afterwards, the House Committee on Territories made a report recommending that the House concur in *certain* of the Senate amendments, but not in the Senate amendment adding Senate sections, 4, 5 and 6, and recommending that the request for a conference on the said amendments be granted, and the House passed a vote to that effect. The Conference Committee united in a joint report, which was presented by the Senate members in the Senate, among other things, making the following addition to section 4 as it was proposed by the Senate, said addition being as follows, to wit :

" That nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law, nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation or subdivision of any territory as to any

bonds heretofore issued or contracted to be issued " (Cong. Rec., vol. 17, pt. 7, p. 7250).

The Senate agreed to this report *(Ib.)*.

The House Committee similarly made a report which was adopted by the House (Cong. Rec., vol. 17, pt. 7, p. 7330). The bill was thus passed and became a law as amended. The above words in full-face type became part of section 4 of the Harrison Act, so that as finally enacted said section of the "Harrison Act" read as follows :

"SEC. 4. That no political or municipal corporation, county, or other subdivision in any of the Territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county or subdivision, to be ascertained by the last assessment for Territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void: **That nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law, nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation or subdivision of any territory as to any bonds heretofore issued or contracted to be issued."**

That Congress regarded this clause in said section 2 of the act of July 30, 1886, as the first prohibition upon the issue of railroad aid bonds is evident both from the above-quoted saving clause in section 4 itself and from the report of the Senate Committee accompanying its proposed amendments to the bill. Note carefully the language of

this saving clause: "Nothing in this act contained shall be so construed as to affect the validity of any act of any Territorial legislature heretofore enacted, or any obligation existing or contracted thereunder." In other words, the prohibition in the said section 2 of the Harrison Act (which prohibition Congress understands is going to effect them for the first time) is not to interfere with the validity of any act of the Territorial legislature theretofore passed, but such acts and the obligations issued or contracted thereunder are to stand as valid. It may be urged that the language of this clause quoted from section 4 is neutral; but the purpose of this clause, taken in connection with the other provisions of the act, and the facts as to outstanding railroad aid bonds in the Territories, as shown in Senator HARRISON'S printed report, clearly was to recognize as valid acts of Territorial legislatures theretofore enacted and bonds issued thereunder.

We say it may possibly be urged that the language of this clause quoted from section 4 is neutral, "That nothing in this act contained shall be so construed as to affect the validity," &c. But this language is in this respect precisely the same as the language of the act of June 8, 1878, which this court referred to and made the basis of its decision in the case of *Lewis vs. Pima County*, 155 U. S., 54. To make this perfectly plain we quote the clauses in question in parallel columns:

"But nothing herein shall have the effect to create any private right except that of holding and executing municipal offices, or to divest any such right, or to make valid or invalid any contract or obligation heretofore made by or on behalf of any such town, city or other municipal corporation, or to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs" (Act of June 8, 1878).

"That nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, *nor to preclude the issuing of bonds already contracted for in pursuance of express provision of law*, nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation or subdivision of any territory as to any bonds heretofore issued or contracted to be issued" (Harrison Act of July 30, 1886).

The clause in the act of 1886 is no more neutral than the clause in the act of 1878. If the language in the act of 1878, "But nothing herein shall have the effect * * * to authorize," is a prohibition, then the clause in the act of 1886, "That nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder," is a validation.

But it is not merely negative and neutral. On the contrary it expressly sanctions the future issue of railroad bonds under existing contracts. This is in plain conflict with the proposition that the said Act of June 8, 1878, forbade such bonds, that is to say in plain conflict with the *Pima County case*. These considerations were not presented to this Court in the *Pima County case* briefs.

That the Harrison Act of Congress of July 30, 1886, treated as valid or validated all bonds and other obligations issued under statutes enacted by Territorial legislatures is further evident from the fact that the said act of June 8, 1878 (20 Stat., 101), **is by reference made a part of the said Harrison Act of July 30, 1886, and this last act provides:**

"That nothing in this *act* contained shall be so construed as to affect the validity of any act of any Territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder; nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law; nor to prevent any Territorial legislature from legalizing acts of any county, municipal corporation or subdivision of any Territory as to any bonds heretofore issued or contracted to be issued."

This proposition is evident from a brief consideration of the statutes in question. If Congress had prohibited such legislation in the said Act of June 8, 1878, can we suppose that it would have allowed the Territorial legislature to legalize such prohibited bonds?

This act of July 30, 1886 (sec. 5), amends section 1889 of the Revised Statutes so as to read as follows:

"The legislative assemblies of the several territories shall not grant any private charters or special privileges, but they may by general incorporation acts permit persons to associate themselves together as bodies corporate for any mining, manufacturing and other industrial pursuits, *and for conducting the business of insurance, banks of discount and deposit (but not of issue), loan, trust and guarantee associations*, and for the construction and operation of railroads, wagon roads, irrigation ditches and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries or any other benevolent, charitable or scientific association."

The words in italic are new.

The act of June 8, 1878 (20 Stat., 101), above quoted is not expressly referred to in this section 1889 as amended by section 5 of the act of July 30, 1886; but this act of June 8, 1878, is nevertheless carried over into section 5 the same as if it had been there set forth at length. It is a part of section 1889 of the Revised Statutes and of the act of July 30, 1886, or it is nothing. The language of the clause from section 4 above quoted is:

"That nothing in this *act* contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law," &c.

It follows that the last clause of the act of June 8, 1878, contained in section 1889 of the Revised Statutes and in the act of July 30, 1886—to wit, "but nothing herein contained shall have the effect * * * to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs," is "not to be so construed as to affect the validity of any act of any territorial legislature heretofore [that is, before July 30, 1886] enacted;" **that is to say, shall not be construed to affect the validity of the Territorial act of February 21, 1883, under which the Pima county bonds were issued.**

For the purposes of the argument here stated, it is immaterial whether the act of June 8, 1878, is to be regarded as incorporated in section 1889 of the Revised Statutes of the United States, or merely as ex-

planatory of said section. In either case it is to be read as a part of said section.

Section 4 of the Harrison Act of July 30, 1886, provides :

> " That nothing in this *act* contained shall be so construed as * * * to prevent any territorial legislature from *legalizing* the acts of any county, municipal corporation or subdivision of any territory as to any bonds heretofore issued or contracted to be issued."

In other words, immediately after the passage of the Act of Congress of July 30, 1886, the legislature of the Territory of Arizona might have said : " We hereby legalize the act of Pima county in issuing these bonds ;" but, as these bonds were issued under and pursuant to the express authority of the act of the territorial legislature, approved February 21, 1883, no validating act of the territorial legislature would have appeared other than as a useless repetition, because Congress in the preceding sentence recognized the validity of such act of February 21, 1883, as an act of a territorial legislature enacted before July 30, 1886, under which the Pima County bonds had been issued.

The language is : " Nothing in this act contained shall be so construed as * * * to prevent any Territorial legislature from *legalizing* the acts of any county * * * as to any bonds heretofore issued. * * * " That is, the last clause of the act of June 8, 1878, contained in section 1889 of the Revised Statutes of the United States, and in the Harrison Act of July 30, 1886 (to wit, " But nothing herein shall have the effect * * * to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs), is " not to be so construed as to prevent

any Territorial legislature from legalizing the acts of any county * * * as to any bonds heretofore issued." * * *

That the United States Senate regarded section 2 in said Harrison act of July 30, 1886, as being the *first* enactment of Congress which prohibited the Territorial legislatures from authorizing the issuance of railroad aid bonds by counties or other political subdivisions of the Territories is evident from the Report (printed in Appendix to this Brief) made by Senator HARRISON as Chairman of the Committee on Territories after he had investigated the matter of the outstanding Territorial indebtedness, and the question of the proper legislative action by Congress :

" Most of our State constitutions contain some limitation upon the power of municipalities to loan their credit and to create municipal debts. **The people of the Territories have no such protection against improvident subscriptions to the stock of corporations** or the reckless creation of municipal debts. As a result, several of our territories have already incurred large territorial debts, and many of the counties and towns have incurred an indebtedness much beyond the limits of prudence."

Again, the report says :

" The first of the added sections prohibits any of the Territories, or any political or municipal corporation or subdivision of any Territory, *from making any subscription to the capital stock of any incorporated company or association, and from loaning its credit to any such company.*"

Case of Lewis vs. Pima County was apparently decided without any consideration of the legislation and legislative history above set forth.

None of the briefs before this court in the case of *Lewis vs. Pima County*, 155 U. S., 54, refers in any way to these important and, indeed, controlling provisions of the "Harrison act" of July 30, 1886, or to the legislative history of the provisions of the said act, which is set forth in this brief. Neither does the opinion of this court in the said case of *Lewis vs. Pima County* even mention the said Harrison act of July 30, 1886. Apparently the importance of these provisions of the act of July 30, 1886, and of this legislative history was not presented by counsel in that case (certainly not in their printed briefs), nor considered by this court.

On this showing we respectfully submit that that case was decided by this court on a point which was not fully argued or presented or *fully* considered by the court in its opinion, and that if the foregoing considerations had been presented, the court must necessarily have arrived at a different result.

We have here stated the foregoing argument concerning the correctness of the decision in the case of *Lewis vs. Pima County*, 155 U. S., 54, not for the purpose of asking this court to reverse its decision in that case. We are well aware of the fact that our opponents may say that this might have been a good argument to address to the court when the case of *Lewis vs. Pima County* was under consideration, but that such argument is too late now, for the matter of the validity of the bonds has been decided and become *res adjudicata*. While we do not assent to any suggestion that the matter is made *res adjudicata* by the case of *Lewis*

vs. Pima County; yet we have made the foregoing argument, not for the purpose of having this court reverse its decision in the case of *Lewis vs. Pima County*, but in order to show to this court the true history, meaning and purpose of the legislation of Congress with reference to the issue of railroad aid bonds by counties or other municipalities in Territories, and particularly in the Territory of Arizona. This has an important bearing in showing why Congress, after the decision of this court in *Lewis vs. Pima County* passed the act approved June 6, 1896, hereinafter referred to, validating railroad aid bonds issued by counties in Arizona, including those issued by Pima County, some of the coupons of which had been in question in the case of *Lewis vs. Pima County*, 155 U. S., 54.

The Funding and Curative Act of June 6, 1896 (29 Stats., 262), Considered.

We proceed now to a consideration of the said act of June 6, 1896.

The case of *Lewis vs. Pima County* was decided in this Court October 29th, 1894. In the light of this decision, and by reason of it, and to cure the defect pointed out by the Court (as is evidenced by the memorial to Congress passed by the Legislative Assembly of the Territory of Arizona in 1895, quoted below in the decision of the Supreme Court of the Territory in the case of *Coconino County vs. Yavapai County*, 52 Pac. Rep., 1127), Congress on June 6th, 1896, enacted the following (29 Stat., 262):

"*An Act amending and extending the provisions of an Act of Congress, entitled 'An Act approving with amendments the funding Act of Arizona,' approved June*

25, 1890, and the act amendatory thereof and supplemental thereto, approved August 3, 1894.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of the Acts of Congress approved June 25th, 1890, and August 3rd, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities and school districts thereof, as provided in the Act of Congress approved June 25th, 1890, until January 1st, 1897, and all outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities and school districts thereof, heretofore authorized by legislative enactments of said Territory bearing a higher rate of interest than is authorized by the aforesaid funding Act approved June 25th, 1890, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds as provided by this Act.

"SEC. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the Act of Congress approved June 25th, 1890, and the act amendatory thereof and supplemental thereto approved August 3rd, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory as hereinbefore authorized to be funded are hereby confirmed, approved and validated, and may be funded as in this Act provided until January 1st, 1897: *Provided*, That nothing in this Act shall be so construed as to make the Government of the United States liable or responsible for the payment of any of said bonds, warrants or other evidences of indebtedness by this Act approved, confirmed and made valid, and authorized to be funded.

"Approved June 6, 1896."

Note the language of the foregoing act approved June 6, 1896 (sec. 2):

"All bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said territory, as hereinbefore authorized to be funded, are hereby confirmed, approved and validated."

The words "as hereinbefore authorized to be funded" refer to the provisions of section 1 of the said act, to wit:

"All outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities and school districts thereof, heretofore authorized by legislative enactments of said Territory, bearing a higher rate of interest than is authorized by the aforesaid act approved June 25, 1890, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded * * * ."

The Supreme Court of the Territory of Arizona has decided that this Act of June 6, 1896, has validated similar railroad aid bonds of another county in Arizona.

Coconino County vs. Yavapai County, 52 Pac. Rep., 1127.

The said Yavapai County railroad aid bonds were issued under an act of the Territorial Legislature of Arizona, entitled "An Act to aid in the construction of a railroad in Yavapai County," approved March 12, 1885.

We here print in full the decision in that case:

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Coconino County vs. Yavapai County.

[Reported, 52 Pac. Rep., 1127.]

(Supreme Court of Arizona, April 16, 1898.)

DIVISION OF COUNTY—LIABILITY ON BONDS.

Bonds were issued by Y. county, under the act of the 13th legislative assembly of March 12, 1885, in aid of a railroad. Y. county was subsequently divided by the act of the legislative assembly of February 19, 1891, into Y. and C. counties, C. assuming a portion of the indebtedness of Y., for which indebtedness it issued its bonds, which were sold or exchanged for territorial funding bonds. Act Cong., June 6, 1896, provided (section 2) that all bonds theretofore issued under the authority of the legislature of Arizona were thereby confirmed, approved and validated. An action was subsequently brought by C. to recover money paid to Y. upon such portion of its bonds as represented its portion of the indebtedness of Y. on the railroad bonds, on the ground that such bonds were unauthorized and void. Held, that the railroad bonds were validated by the act of congress, supra, and that, since plaintiff was a part of Y. at the time the bonds were issued, it not appearing that Y. had been released from liability thereon, plaintiff would be liable for its share of the bonds, and a demurrer to the complaint was properly sustained.

Appeal from District Court, Yavapai county, before Justice RICHARD E. SLOAN.

Action by Coconino county against Yavapai county. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

E. S. CLARK, Dist. Atty., and EDWARD M. DOE, for appellant; H. D. ROSS, Dist. Atty., and R. W. O'SULLIVAN, Asst. Dist. Atty., for appellee.

STREET, C. J.: The 13th legislative assembly of Arizona, on the 12th day of March, 1885, passed an act to aid in the construction of a railroad in Yavapai county, which authorized the issuance of bonds on the faith and credit of Yapavai county, to the amount of

$4,000 per mile, for the construction of a railroad from a point near Chino station, on the Atlantic & Pacific Railroad, to Prescott, and to the northern boundary of Maricopa county. Soon thereafter was constructed the Prescott & Arizona Central Railroad from a point near Chino station called Seligman, to the City of Prescott, all in Yavapai county, Ariz., and the bonds of Yavapai county were issued to the company constructing said railroad to the number of 292, and in the denomination of $1,000 each. At that time the territory now embraced in Coconino county was a part of Yavapai county. The 16th legislative assembly of Arizona, on the 19th of February, 1891, created the county of Coconino out of certain territory then belonging to Yavapai county. By the act creating the county of Coconino it was provided that one-third of the indebtedness of Yavapai county, less $25,000 (the same being one-third of the estimated valuation of the public improvements in said county of Yavapai at the time of the passage of the act), shall be assumed and paid by the county of Coconino to the county of Yavapai, and that the county of Coconino should issue to the county of Yavapai negotiable coupon bonds covering all indebtedness, bearing interest at the rate of 7 per cent. per annum, and that said bonds should be delivered to the treasurer of Yavapai county, and Yavapai county was authorized to take, own and hold the said bonds, and, through its board of supervisors, dispose of and transfer the same to the benefit of said Yavapai county. In compliance with said act the boards of supervisors of the respective counties met at the city of Prescott, and ascertained the amount of indebtedness of Yavapai county as it existed on the 19th day of February, 1891, the date of the passage of said act, to be the sum of $533,926.50, and the proportion of said indebtedness belonging to Coconino county to be the sum of $152,975.50. Thereafter, on the 2d day of June, 1891, the said board of supervisors of Coconino county made, executed and delivered to Yavapai county 153 negotiable bonds dated May 1, 1891, bearing interest at the rate of 7 per cent. per annum, interest payable annually on the 2nd day of January of each year. Each of said bonds, except the last one, numbered 153, was for the principal sum of $1,000, and said bond numbered 153 was for the principal sum of $975.59. It is alleged by plaintiff that on the 19th day of February, 1891, the sum of $294,-

779.84, which was included in the total amount of indebtedness of Yavapai county, was for and on account of the bonds which had been issued and delivered to the Prescott & Arizona Central Railroad Company, under and by virtue of the act of the 13th legislative assembly aforesaid, that the said act of the 13th legislative assembly was void, and that the sum of $98,-259.32 is the proportion which Coconino county assumed to pay to Yavapai county of said void bonds. This action was brought by Coconino county to recover the said sum of $98,259.32, together with interest thereon, which Coconino county had paid to Yavapai county from the date of said bonds to the 15th of January, 1895. To this complaint, the defendant, Yavapai county, filed a demurrer, which the district court of Yavapai county sustained, and rendered judgment thereon in favor of the defendant, from which judgment the plaintiff appeals to this court. The questions raised by the plaintiff in his brief are: First. Whether the bonds given by Yavapai county in aid of the Arizona Central Railroad Company were void when issued; second, whether, if then void, the act of congress entitled "An act amending and extending the provisions of congress entitled 'An act approving with amendments, the funding act of Arizona, approved June 25th, 1890, and the act amendatory and supplemental thereof, approved August 3rd, 1894,'" approved June 6, 1896, is applicable to said bonds. Whether or not the act of March 12, 1885, of the 13th legislative assembly, authorizing Yavapai county to issue bonds for the construction of said railroad, was within the power of the legislature to enact, or whether the bonds that were issued in pursuance of said act were originally valid or not, this court does not feel called upon to decide, for the view we take of the matter is that the validity of the bonds is to be determined by the act of congress approved June 6, 1896, section 2 of which is as follows: "That all bonds and other evidence of indebtedness heretofore funded by the loan commission of Arizona, under the provisions of the act of congress approved June 25, 1890, and the act amendatory thereof and supplemental thereto approved August 3d, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said territory as hereinbefore au-

thorized to be funded are hereby confirmed, approved and validated, and may be funded as in this act provided until January first, 1897, provided that nothing in this act shall be so construed as to make the government of the United States liable or responsible for the payment of any of said bonds, warrants or other evidences of indebtedness by this act approved, confirmed and made valid and authorized to be funded." Under that act all bonds which had been issued by virtue of the territorial legislative enactments were permitted to be funded in territorial funding bonds. The act of congress aforesaid made valid all of the bonds which were issued under the legislative act of March 12, 1885. That the act of congress was intended to meet the question of bonds issued under the legislative act of March 12, 1885, is made more certain, and the construction of the language of it becomes more easy of interpretation, under the history which surrounds its passage. The territorial legislative assembly of 1895 passed a memorial asking congress for an enactment of some such law, the text of which memorial is as follows: Whereas, under the various acts of the legislative assembly of the territory of Arizona, certain of the counties of the territory were authorized to issue in aid of railroads and other *quasi* public improvements and did under such acts issue bonds, which said bonds were sold in open market, in most instances at their face value, and are now held at home and abroad by persons, who, in good faith invested their money in the same, and, save and except such knowledge as the law imputes to the holder of bonds issued under authorized acts, are innocent holders of the same; and whereas, the validity of these bonds for many years after their issuance was unquestioned, and acknowledged by the payment of the interest thereon as it fell due; and whereas there has recently been raised a question as to whether these acts of the legislative assembly were valid under the organic law of the territory, which had led to a movement looking to the repudiation of the indebtedness created under and by virtue of such acts; and whereas, we believe that such repudiation would, under the circumstances, work great wrong and hardship to the holders of such bonds, and at the same time seriously affect the credit and standing of our people for honesty and fair dealing and bring us into disrepute; wherefore we most strongly urge upon your most hon-

orable bodies the propriety and justice of passing such curative and remediable legislation as will protect the holders of all bonds issued under the authority of acts of the legislative assembly, the validity of which has heretofore been acknowledged, and that you further legislate as to protect all innocent parties having entered into contracts resulting from inducements offered by our territorial legislation, and relieve the people of the territory from the disastrous effects that must necessarily follow any repudiation of good faith on the part of the territory, and that you may so further legislate as to validate all acts of the legislative assembly of the territory which have held out inducements for the investment of capital within the territory, and which have led to the investment of large sums of money in enterprises directly contributing to the development and growth of the territory, and thus relieve the honest people of the territory from the disastrous effects that must necessarily follow any violation of good faith on the part of our people. Resolved, that our delegate to congress be, and he is hereby, instructed to use all honorable means to bring this subject to the earnest consideration of congress; that the secretary of the territory be, and he is hereby, requested to transmit a copy of the foregoing to each house of congress, and to our delegate in congress." Another reason why the demurrer was properly sustained is that the plaintiff alleges that many of the said 153 bonds, covering the amount of $98,259.32 executed and delivered by Coconino county to Yavapai county have been sold and delivered to divers and sundry persons, and the remainder exchanged for territorial funding bonds, under the territorial funding act and the act of congress providing for the funding of territorial and county indebtedness; and it was shown by the complaint that the same had been done before this action was brought, and failed to show any other condition than that the obligations of Yavapai county on the bonds issued by it to the Prescott & Arizona Central Railroad Company was outstanding and remained as a Yavapai county liability and indebtedness. For aught this court knows, there may be already a judgment againt Yavapai county, making it compulsory upon that county to pay these railroad bonds. Until Yavapai county is relieved of its obligation to pay the bonds issued by it for the construction of the railroad, Coconino county, which was a por-

tion of Yavapai county at the time the bonds were issued, must be held to bear its portion of the burden. The judgment of the district court is affirmed.

DAVIS and DOAN, JJ., concur. SLOAN, J., having been Judge in court below, did not sit in this case in supreme court.

Note the definiteness of the language both of section 2 and of section 1, of the said Act of Congress of June 6, 1896. It is not "all bonds," but "all bonds heretofore issued *under the authority of the legislature* of said territory;" not all bonds which had been issued by authority of law generally, but all bonds which the legislature of the Territory has expressly said might be issued. This points definitely to a legislative act of the Territory, and says that wherever bonds have been issued under such legislative act, and are outstanding at the time of the passage of the act of June 6, 1896, the same are "confirmed, approved and validated."

Note also the precision and definiteness of the language of section 1 of this act: All outstanding bonds of the counties "authorized by *legislative enactments* of said Territory * * * shall be funded." These provisions of this act of Congress of June 6, 1896, were clearly intended to validate all bonds issued by the Territory, or by the counties, municipalities and school districts thereof, down to that time, wherever there had been an act of the Territorial legislature authorizing their issue and the bonds had been issued. This act of Congress does not say that all bonds are validated which have been issued *in accordance with the acts of Congress*, nor in accordance with the acts of Congress *and* acts of the Territorial legislature. Such bonds would have needed no validation, and the words would have been ineffective and meaningless. "The

whole need no physician: but they that are sick." What the act sought to do and did do was to validate all bonds which had been issued pursuant to acts of the legislature of the Territory of Arizona, but which were invalid because not issued in accordance with the acts of Congress. Clearly, Congress might have given to Pima County direct authority to issue these bonds precisely as they were issued. What it has done is to make valid such bonds after they have been issued under authority of a legislative enactment of the Territory of Arizona, and the bonds are thus made valid although any prior act of Congress may have rendered them invalid.

Congress has power to pass the foregoing Curative Acts.

It is hardly necessary to make any argument before this court that Congress has full and absolute power thus to legislate for the Territories. Congress has as much absolute right to govern the Territory of Arizona, or any county therein (for example, Pima County), directly and absolutely, and without consulting the Territory or the county, as it has to govern the District of Columbia. Congress has as much right to exercise this control over the affairs of Pima County and over the incurring and validating of indebtedness of such county as it has over the incurring and validating of indebtedness of the District of Columbia. Congress is not obliged to consult either the people or any local officers either in the one case or the other. Indeed, Congress might abolish or change in any way that it sees fit any of the Territorial governments, and nobody in the Territory could legally complain.

There are numerous decisions of this court in which it has thus stated the character and extent of the authority of Congress over the Territories and of the political subdivisions thereof. It is sufficient to refer to the case of the *First National Bank of Brunswick vs. County of Yankton*, 101 U. S. 129, in which case it appeared that an act of Congress had validated $200,000 bonds of Yankton County, Dakota Territory, which would have been invalid but for such act of Congress. This court in that case, Mr. Chief Justice WAITE giving the opinion, said (p. 132):

"It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded. The act to adapt the ordinance to provide for the government of the Territory northwest of the river Ohio to the requirements of the Constitution (1 Stat. 50) is chap. 8 of the first session of the first Congress, and the ordinance itself was in force under the confederation when the Constitution went into effect. All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political sub-divisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

"In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and con-

tinues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States."

The general principle is well settled that subsequent legislative ratification of acts of a municipal corporation is equivalent to original legislative authority. We need cite no authority for this proposition.

We refer, however, to a few authorities:

"In the absence of special constitutional restrictions the competency of the legislature to enact retrospective statutes, to validate an irregular or defective execution of a power by a municipal or public corporation is undoubted. And the power to cure defective subscriptions to the stock of railway companies and to validate bonds issued therefor has been frequently exercised and judicially sustained. Subsequent legislative sanction within constitutional limits is equivalent to original authority."

Dillon, Mun. Corp., 4th Ed., Sec. 544.

"There is no doubt of the right of the legislature to pass statutes which reach back to and change or modify the effect of prior transactions."

Cooley, Const. Lim., p. 370.

"We have already referred to the case of contracts by municipal corporations which, when made, were in excess of their authority, but subsequently have been confirmed by legislative action. If the contract is one which the legislature might originally have authorized the case falls within the principle above laid down and the right of the legislature to confirm it must be recognized. This principle is one which has very often been acted upon in the case of municipal subscriptions to works of internal improvement, where the original undertaking was without authority of law,

and the authority given was conferred by statute retrospectively."
Id., p. 379.

In *New Orleans vs. Clark*, 95 U. S., 644, it was claimed that the bonds issued were invalid because the City had exceeded its authority by law to issue them. One of the questions presented was:

"Whether it was competent for the legislature of Louisiana to legalize the issue of the bonds if for any cause they were originally invalid."

The Court answers in the affirmative and says:

"The books are full of cases where claims, just in themselves, but which from some irregularity or omission in the proceeding by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured."

In *Read vs. Plattsmouth*, 107 U. S., 568, the Court held the bonds to be valid, and the question was whether the issue of bonds can be supported by the subsequent legislation which sought to cure the defects of their origin. It was held that the curative act was not forbidden by the constitution of Nebraska as retroactive laws are not forbidden, and that the clause that no *ex post facto* law, or any law impairing the obligations of contracts, shall ever be passed does not include legislation of the class in question.

Bolles vs. Brimfield, 120 U. S., 759, and *Anderson vs. Santa Anna*, 116 U. S., 356, hold that:

"Subsequent legislative ratification of the acts of a municipal corporation, which might lawfully have been performed under legislative sanction in the first instance, was equivalent to original authority."

Congress had power to validate the Pima County bonds after the decision in the case of Lewis vs. Pima County as well as before.

The fact that this court had decided in *Lewis vs. Pima County* against the validity of certain coupons detached from these bonds, which coupons were in suit in that case, did not operate to prevent Congress from validating such bonds. If the bonds were invalid at all they were invalid before that decision as well as after that decision. The judgment merely decided that the plaintiff in that case could not recover on the coupons. The judicial declaration of this fact did not add anything to the invalidity of the bonds. It merely stated a fact which already existed. Congress had just as much power to validate these bonds after the decision in the case of *Lewis vs. Pima County* as before that decision. The precise proposition involved in the validation of these bonds is as follows: That Congress at the time of the passage of the validating act had absolute power of legislation over Pima County, and it could declare and provide that bonds which had been issued by Pima County should be valid and treated as such. Congress had this power after the decision in the case of *Lewis vs. Pima County* the same as before that decision. The act of Congress validating these bonds does not in any way attempt to trespass upon the functions of the courts which had decided certain coupons therefrom invalid. It is the function of the court to decide controversies upon the facts and legislation as they exist at the time the decision is rendered. If the facts and legislation change after the decision is rendered then a new and different

case is presented, and the former decision of the court has no application. Congress has full power to legislate for the Territories just as much after a decision of the courts regarding previous congressional legislation as it had in making such previous legislation. The fact that in the meantime the courts have declared what the previous legislation means does not prevent Congress from making any new provisions which it deems best regarding Territories, or any of their political subdivisions. If this were not the law, then one decision of the courts regarding a matter would put the legislation of Congress on the subject at a standstill.

It is eminently proper that, when the bonds of a government have been issued and afterwards bought and sold in the market in good faith, the legislative branch of the government should remedy any defect, or supposed defect, in the method of issuing such bonds, or validate such bonds where they have been issued without authority. So, also, it is proper for any government, when any political subdivision of such government has similarly issued its bonds, to remedy any defects in such bonds, or validate them if they have been issued without authority. In such case the government, being the promisor in such obligations, or (what is the same thing) having some political subdivision which is the promisor in such obligations, says in effect to its creditor and to its own officers, "These bonds shall be paid." In other words, Congress, in passing the validating act of June 6, 1896, was in the position of a debtor who says, "I will not insist on my legal right to defend against these obligations, but I will pay my debts," or (what is the same thing) says, "a part of myself—namely, the County of Pima, in

the Territory of Arizona—over which county I have absolute control, shall not insist upon any legal defense to these Pima County bonds, but shall pay these bonds." This is merely the debtor, or the sovereign which controls the debtor and of which the debtor is a part, waiving the right to insist on some legal defense against its obligations, and providing that they shall be paid according to their terms. That there is no objection to Congress taking this position in regard to the matter affecting a part of the territory of the United States is obvious, and no authority is needed to support it. This court has decided this principle as to public lands which were given as a bonus to aid in the construction of railroads through States and Territories. The same principle applies in the case of an issue of bonds granted in aid of the construction of a railroad. The cases to which we refer are *United States vs. Winona and Saint Peter Railroad Company*, 165 U. S., 463; *United States vs. Union Pacific Railway Company*, 165 U. S., 482, and other cases. The facts in those cases were substantially as follows: Congress passed certain acts making grants of lands to the Pacific Railroad companies and to other railroad companies in aid of the construction of their railroads. Afterwards this court in the case of *Kansas Pacific Railway Company vs. Dunmeyer*, 113 U. S., 629, decided that certain lands did not pass under the railroad grant, because at the time of the filing of the map of definite location they were on the records of the Interior Department claimed under homestead and preëmption entries. Nevertheless, prior to that decision many lands thus located had been sold by the railroad companies and come into the hands of purchasers who paid value for them. The legal title to

these lands, however, under the decision in *Kansas Pacific Railway Company vs. Dunmeyer, supra*, remained in the United States. Here, then, were acts of Congress granting certain lands; a decision of this court to the effect that the lands in question were not embraced in the grant; nevertheless, afterwards Congress undertook to legislate and to confirm and vest in the holders of these lands the legal title which this court had decided in *Kansas Pacific Railway Company vs. Dunmeyer, supra*, was in the United States and not in such holders. And this later legislation was expressly held valid, and held to govern the matter in the said case of *United States vs. Winona and Saint Peter Railroad Company, supra.*

It is the duty of the defendants to fund these Pima County bonds by issuing the Funding bonds of the Territory therefor as provided in the Acts of Congress and of the legislature of said Territory, and the writ of mandamus as sought by the relator should have been awarded.

The history of the funding acts of Arizona and of Congress may be briefly re-stated as follows:

In 1887 the Territory enacted a Funding Act, Chap. XXXI., R.S. Ariz., Sec. 2053–2067, reprinted Appendix, p. 72. This is the Territorial Act which Congress amended by the Act of June 25, 1890, referred to below.

This chapter (XXXI.) authorizes the funding of Territorial and County indebtedness by the Loan Commission. It was the law in force June 25th, 1890, when Congress came to the relief of the Territory and the counties because the limitations in sections 3 and

4 of the so-called "Harrison Act" conflicted with the operation of said Act, and a large amount of indebtedness was outstanding which was beyond the limits of said "Harrison Act," and Congress amended said Funding law by the Act of June 25, 1890 (Reprinted in Appendix hereto. *Post, p. 78*). It is entitled "An Act approving with amendments the funding Act of Arizona." The very first words are: "*That the Act of the Revised Statutes of Arizona of 1887, known as 'Title XXXI.—Funding,' be and is hereby amended so to as to read as follows, and that as amended the same is hereby approved and confirmed subject to future territorial legislation.*"

Then Congress proceeded to amend the said Territorial act, keeping the title, paragraph numbers, &c., the same as in the statute enacted by the Territorial legislature. In other words, Congress took this funding act of the Territorial legislature, made some changes in it, and handed it back to the Territory, and expressly provided that this act is "*subject to future Territorial legislation.*" Mark the unusual and important words: "**Subject to future Territorial legislation.**" This not only recognized, but expressly delegated to the Territory of Arizona, in view of the local situation in that Territory, full power to legislate further on the subject of funding Territorial and municipal indebtedness. Such future legislation by the Territory was had in the Act of March 19, 1891, which is referred to below. The clause, "*subject to future Territorial legislation,*" means that the Territory is empowered so to legislate. It is positive delegation of the power so to do if the territory needed such authority in addition to its general authority. It gives the Territory power to legislate *in regard to*

this very matter if special authority were needed. The precise, specific, thoughtful purpose of this provision was to prevent its being held that Congress having legislated on the subject such legislation excluded further or other Territorial legislation. It is more: it is a grant of power to the territory so to legislate, if such power did not otherwise exist.

Accordingly, the Territory enacted the Act of March 19, 1891 (Laws of 1891, p. 120, printed in the Appendix to this brief). This Act re-enacts the above Act with some additions hereinafter mentioned, and said Territorial Act of 1891 has been in force ever since. It has never been annulled or disapproved by Congress.

The Act of Congress of August 3, 1894 (printed in Appendix) and the said Act of June 6, 1896, only amend Section 15 of the Act of June 25, 1890. That section limited funding to certain indebtedness. Such limitation was changed by the Acts of Congress of August 3, 1894, and June 6, 1896, but in other respects the said funding Act remained unchanged, except by said Act of the Territory of Arizona of March 19, 1891.

The said Act of Congress of June 25, 1890 (26 St., p. 175), subject to future legislation by the Territory creates the loan commissioners of Arizona and prescribes their duties. It provides for the payment of existing indebtedness by issuing bonds at a lower rate of interest.

In detail the said Act of June 25, 1890 *(post, p. 78)*, describes how the bonds are to be made and provides for a tax. Section 10 provides that the loan Commissioners—

"May, on written demand, require an official report from the board of supervisors of their bonded and outstanding

indebtedness, and said loan commissioners shall provide for the redeeming or refunding of the county indebtedness upon the official demand of said authorities in the same manner as other territorial indebtedness and they shall issue bonds for any indebtedness now allowed or that may hereafter be allowed by law to said county upon official demand by said authorities."

If there had been no subsequent legislation it may be (a point not necessary to be decided in this case) that the commissioners could only act upon the report of the supervisors, though they could demand such report.

But there was subsequent legislation, to wit, the said Territorial Act of March 19, 1891. (Reprinted in Appendix, *post*, p. 85). This Act we proceed to consider in its application to the case at the bar.

The Territorial Act of March 19, 1891, expressly gives the holders of these Pima County bonds the right to have them refunded.

The Territorial Legislature (as expressly permitted by the above Act of Congress of June 25, 1890), passed an Act approved March 19th, 1891, entitled :

" An Act to provide for funding territorial, county and other indebtedness and supplemental to the Act of Congress entitled 'An Act approving with amendments the funding act of Arizona,' approved June 25th, 1890 " (Laws of Arizona, 1891, p. 120).

The said Act provided :

" SECTION 1. That the Act of Congress entitled 'An Act Approving with Amendments the Funding Act of Arizona,' approved June 25th, 1890, be, and the same is hereby, now re-enacted as of the date of its approval, subject to the modifications and additional provisions hereinafter set out, and to carry out the purpose and intention of said Act of Congress, the loan commission-

ers of the Territory of Arizona shall provide for the liquidation, funding and payment of the indebtedness existing and outstanding on the 31st day of December, 1890, of the Territory, the counties, municipalities and school districts within said Territory, by the issuance of bonds of said Territory, as authorized by said Act, and all bonds issued under the provisions of this Act and the interest thereon shall be payable in gold coin of the United States."

The said Act of March 19, 1891, also provided :

"SEC. 7. Any person holding bonds of any County existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this Act, at no less than their face or par value and the accrued interest at the time of the exchange ; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon."

This Act (reprinted at large in the Appendix hereto) gives the right to any holder of bonds to exchange them. As he has this right, it is the duty of the commissioners to make the exchange. They have no discretion. The right is absolute and the duty is commensurate therewith.

That this Act, by its terms (Sec. 7), gives the bondholder such right cannot be disputed. (*Post*, p. 88, Sec. 7). If the Act is valid, the judgment denying the mandamus is wrong. Why not valid ?

Such legislation was not only generally authorized by the Organic Act, but specifically by the Act of June 25, 1890.

In 1886, in the Harrison Act, Congress validated these and other like bonds, or at least recognized their validity, and by the Act of June 25, 1890, amending the funding Act of Arizona, provided for the funding of bonds of this class and sent the Act as amended back to the Territory with power to enact further leg-

islation on the subject of funding such bonds, which power the Legislature of Arizona exercised in passing the supplemental and amendatory funding act of March 19, 1891. In this condition of legislation the Pima County Case came on for decision in this Court, and this Court, in 1894, without having fully before it the legislation of Congress and of the Territory above discussed, or the validating provisions of the Harrison Act, or the provisions of the Act of June 25, 1890, and the supplemental Act of the territorial legislature of March 19, 1891, as to the funding of such bonds, held that the Pima County bonds were invalid under the Act of June 8, 1878. This was the situation in 1896 when the attention of the Congress was called to the Pima County decision, and Congress then reaffirmed its will and purpose in the Act of June 6, 1896, by again validating these bonds and providing that they should be funded. How funded? Funded under and in accordance with the combined legislation of Congress and the Territory in and by the Act of June 25, 1890, and the territorial supplementary act of March 19, 1891. Therefore, the validating Act of June 6, 1896, is a provision that they shall be funded under the Act of June 25, 1890, as amended and supplemented with the consent of Congress by the Territorial Act of March 19, 1891. The Act of June 6, 1896, thus provides for the carrying out of the Act of March 19, 1891, which, as above shown, clearly provides that the bondholder who is willing to take a reduced rate of interest shall have the right to demand the funding bonds. Why not? Congress said in this act for the second time these bonds were valid. It thereby imposed an absolute obligation on the part of Pima County to pay them, and if they are not funded the

county must pay seven per cent. Again we ask, why not? Certain railroad aid bonds issued by counties in Arizona, to wit, the Maricopa County and part of the Yavapai County bonds, had already been refunded, and Congress ratified the funding. Why, therefore, should the Courts hesitate to construe the Territorial Act of March 19, 1891, and the Act of Congress of June 6, 1896, beneficially to the county by holding that they provide that if any bondholder is willing to take the reduced interest he may have the benefit of the funding provisions?

The said Territorial Act of March 19, 1891, was in force when Congress passed the said Act of June 6, 1896. Congress knew this fact, and that it must disapprove this in order to annul it, for, under the Revised Statutes (§ 1850) and the Organic Act of the Territory (9 Stat., 449, and 12 Stat., 665), "All laws passed by the legislative assembly shall be submitted to Congress, and, *if disapproved*, shall be null and of no effect."

The said Territorial Act of March 19, 1891, was therefore, submitted to Congress, and *was never disapproved by it.* Said Act, therefore, stands in full force and effect under the general legislative power conferred by the Organic Act of the Territory, as well as by the specific power conferred by said Act of Congress of June 25, 1890, upon the Territory, to legislate in regard to this particular subject.

"Repeals by implication are not favored." *Per* Mr. Justice BREWER in *Lees v. United States*, 150 U. S. 476, 479. This principle is well settled.

The said act of Congress of June 6, 1896 (Brief, p. 30), also gives the holder of these Pima County bonds the right to have them funded.

The said act expressly provides (sec. 1) :

" All outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities and school districts thereof, heretofore authorized by legislative enactments of said Territory bearing a higher rate of interest than is authorized by the aforesaid funding Act approved June 25, 1890, and which said bonds, warrants, and order evidences of indebtedness have been sold or exchanged in good faith with compliance with the terms of the acts of the legislature by which they were authorized, **shall** be funded with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds as provided by this Act."

Note the language of this act of Congress of June 6, 1896—" *shall* be funded." This language is clearly mandatory, and requires the Loan Commissioners to fund these Pima County bonds. These bonds were expressly validated and hence the provisions for funding on a lower basis if the bondholder would consent.

This was an original suit brought in the Supreme Court of Arizona, praying for a writ of mandamus directing the Loan Commissioners of Arizona to fund the bonds of the County of Pima held by Appellants. The Code of Arizona provides that the writ may be issued by the Supreme Court :

" To compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station ; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled. This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy

in the ordinary course of law" (Rev. Stat., Arizona, Sec. 2335, Tit. Mandamus).

That mandamus is the proper remedy to compel the issue of bonds in a case where the statute provides for such issue, and gives to the relator a right to receive such bonds or even their proceeds, has been recently decided by the Court of Appeals of the State of New York, in *People ex rel. Dady vs. Supervisor*, 154 N. Y., 381, in which case the court, on the relation of a contractor, granted a mandamus directing the issue and sale of bonds as provided in the statute in order to furnish moneys to pay such contractor. Much more is mandamus the proper remedy in the present case, where the statutes expressly give to the relator the right to receive the bonds themselves.

The Act of Congress of August 3, 1894 (28 St., p. 224), printed in Appendix *(post*, p. 90*)*, extended the operation of said Act of Congress of June 25, 1890, to indebtedness down to December 31st, 1885, and said Act of Congress of June 6th, 1896 *(ante*, p. 30*)*, extends the Acts down to January 1st, 1897.

As the right has been given to the holder of the bonds to exchange them for funding bonds as aforesaid, if the loan commissioners refuse to do so on demand, the holder has no other remedy except to appeal to the Court to direct them to do their duty. This is what has been done in the present case.

Said Sec. 7 of the Territorial Act of March 19, 1891, quoted above, gives to the holder of bonds not due the absolute and unconditional right to fund if he wishes, provided he is willing to fund at par and to receive only 5 per cent. interest on the new bonds. Having this right he has made demand to have his holdings

funded on these terms, and he has been refused. He has been deprived of the use and enjoyment of a right and therefore is entitled to the remedy by the Code. He has no other adequate remedy.

The answer raises only one issue which is an issue of law as to the validity of the bonds. If the bonds are valid we have the right to the remedy.

The Supreme Court of the Territory has decided that the said Act of Congress of June 6, 1896, validated similar railroad aid bonds of Yavapai County, Arizona, issued under an Act of the Territorial Legislature, approved March 12, 1885.

Coconino County vs. Yavapai County, 52 Pac. Rep., 1127. Text in full of said decision see *ante*, p. 33.

We submit therefore that the bonds are valid ; that by law the holders of the same have the right to have them funded by exchange of the present seven per cent. county bonds and matured coupons at par, for five per cent. Territorial funding bonds, provided for by the said Acts of Congress and the Territory.

The holders have offered their bonds and demanded the exchange. The defendants the loan Commissioners have refused to perform the duty imposed upon them by statute. The Court should require them to perform it.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
WM. H. BARNES,
Counsel for Appellants.

APPENDIX TO BRIEF.

I.

Re Harrison Act.

49TH CONGRESS, 1st Session. } SENATE. { REPORT No. 1227.

IN THE SENATE OF THE UNITED STATES.

JUNE 15, 1886.—Ordered to be printed.

MR. HARRISON, from the Committee on Territories, submitted the following

REPORT:

[To accompany bill H. R. 5179.]

The Committee on Territories, to whom was referred the bill (H. R. 5179) to prohibit the passage of local or special laws in the Territories of the United States, respectfully report:

This bill was intended to throw about the legislation of the general assemblies of the Territories one of the safeguards against improper legislation which is found in the constitutions of most of the States.

There is now general concurrence in the opinion that special legislation, in all cases were general laws can be made applicable, should be prohibited. Some of our Territories have now become so populous and worthy, so full of commercial and business enterprise, that the necessity of imposing such limitations upon the power of the Territorial assemblies as are found in the best constitutions of the States seem to be imperative in order to protect the people against unwise and hasty legislation.

Most of our State constitutions contain some limitation upon the power of municipalities to loan their credit and to create municipal debts. **The people**

of the Territories have no such protection against improvident subscriptions to the stock of corporations or the reckless creation of municipal debts. As a result several of our Territories have already incurred large Territorial debts, and many of the counties and towns have incurred an indebtedness much beyond the limits of prudence.

Desiring to obtain the most recent statistics upon this subject, the chairman of this committee addressed the governors of the several Territories, and in response received detailed information from each, which will be presented in an appendix to this report.

* * * * * *

The committee, in view of the condition of things in some of the Territories, disclosed by these reports of the governors, have thought it wise to report certain amendments to the House bill—

First, by making some changes in the list of subjects as to which special legislation is prohibited; and,

Second, by adding several sections restrictive of the power to create municipal and Territorial debts.

The first of the added sections prohibits any of the Territories or any political or municipal corporation or subdivision of any Territory from making any subscription to the capital stock of any incorporated company or association, and from loaning its credit to any such company.

The second limits the power of Territorial assemblies to create debts to the necessary purposes specified therein.

The third prohibits the counties and municipalities from creating any debt exceeding 2 per centum on the value of the taxable property as ascertained by the assessment.

The fifth amends section 1889 of the Revised Statutes of the United States by extending the power of the Territorial assemblies so that they may authorize by general law the incorporation of insurance companies, banks of discount and deposit, loan, trust, and guaranty associations.

The committee are of the opinion that the passage of the bill as amended will give much greater security to property and in the end a safer development of the resources of the Territories. It is true that all Territorial legislation is now subject to be annulled or modified by act of Congress. But experience has shown

that it is very difficult to exercise this power wisely. It is fully reserved, however, in this bill.

We therefore recommend the passage of the bill with amendments.

APPENDIX TO REPORT.

ARIZONA.

OFFICE OF THE GOVERNOR,
Prescott, Ariz., December 22, 1885.

* * * * * *

County indebtedness to January 1, 1885.

County.	Nature of indebtedness.	Amounts	Totals.
Cochise	Bonded	$155,000	
	Outstanding warrants	40,000	
			$195,000
Pinal	Bonded	8,000	
	Outstanding warrants	12,400	
			20,400
Pima	Bonded	204,750	
	Outstanding warrants	127,725	
			332,475
Yavapai	Bonded	169,000	
	Outstanding warrants	35,000	
			204,000
Maricopa	Bonded		100,000
Mohave	Outstanding warrants and interest.		39,750
Graham	Outstanding warrants		25,000
Apache	Bonds	10,000	
	Outstanding warrants	50,000	
			60,000
Yuma	Outstanding warrants		110,000
Gila	Bonded		15,000
	Total		1,101,625

NEW MEXICO.

Under date of January 1, 1886, Governor Ross furnished the following statement:

Territorial or County.	Nature of indebtedness.	Amount.
Grant County----	Railroad bonds-------	$57,000 00
	Municipal indebtedness (*railroad* bonds)----	46,800 00
Santa Fé County-	Railroad bonds-------	150,000 00

WASHINGTON TERRITORY.

EXECUTIVE OFFICE,
Olympia, January 25, 1886.

* * * * * *

The bonded indebtedness of Thurston County [$75,000] was *incurred in aid of railroad construction.*

* * * * * *

II.

Section 1889, Revised Statutes United States.

The legislative assemblies of the several Territories shall not grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing and other industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries or any benevolent, charitable or scientific association.

III.

An act explanatory of section 1889 of the Revised Statutes of the United States, and to ratify and confirm certain territorial legislation, and for other purposes (20 Stats., 101).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the words 'the legislative assemblies of the several territories shall not grant private charters or especial privileges,' in section 1889 of the Revised Statutes of the United States, shall not be construed as prohibiting the legislative assemblies of the several territories of the United States from creating towns, cities or other municipal corporations, and providing for the government of the same, and conferring upon them the corporate power and privileges necessary to their local administration by either general or special acts; and that all general and special acts of such legislative assemblies heretofore passed creating and providing for the government of towns, cities or other municipal corporations, and conferring such rights, powers and privileges upon the same as were necessary to their local administration, be, and the same are hereby, ratified and confirmed and declared to be valid, any law to the contrary notwithstanding; *subject, however, to amendment or repeal hereafter by such legislative assembly.* But nothing herein shall have the effect to create any private right except that of holding and executing municipal offices, or to divest any such right, or to make valid or invalid any contract or obligation heretofore made by or on behalf of any such town, city or other municipal corporation, or to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs.

Approved June 8, 1878.

IV.

Territorial Act of February 21, 1883.

An Act to promote the construction of a certain railroad.

[Laws Territory of Arizona, 1883, p. 61]

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1.—Upon information in writing to the Chairman of the Board of Supervisors of Pima County, Arizona Territory by the President of the Arizona Narrow Gauge Railroad Company, the corporation of that name which filed its articles of association with the Secretary of said Territory, on the 23rd day of November, A. D. 1882, that said railroad company is ready to exchange bonds with the said County of Pima, according to the provisions of this Act, it shall be the duty of said Chairman, and he is hereby directed to call a meeting of said Board, to be held within five days after the receipt of said notification, and it shall be the duty of said Board of Supervisors, and they are hereby directed to meet within five days, at the county seat of said county, and then and there to order issued two hundred thousand dollars of bonds of said County, in denominations of one thousand dollars each, and bearing interest at the rate of seven per cent. per annum, interest payable semiannually, the principal payable in twenty years, which said bonds, and the interest coupons thereto attached shall be signed by said Chairman and the Clerk of said Board, and shall, within thirty days after the said order of issuance thereof has been made, be delivered by the Clerk of said Board to the County Treasurer of said County of Pima, to be by him disposed of as hereinafter provided, and said County Treasurer shall receipt to the said Clerk for the said bonds.

SEC. 2. Upon the application of said railroad company to the said Treasurer, and the tender by said company of fifty thousand dollars of the first mortgage bonds of said company in like denominations, bearing like interest and payable in like time as those

of said County, it shall be the duty of said Treasurer, and he is hereby directed to deliver fifty thousand dollars of bonds of said county to the President and Secretary of said railroad company, in exchange for fifty thousand dollars of the first mortgage bonds of said railroad company, so tendered as above provided. And whenever, and so often as five each miles of said railroad shall have been graded, laid with ties and iron, said Treasurer shall upon proof thereof, which proof shall be the certificate of the County Surveyor to that effect, exchange with the said President and Secretary of said railroad company fifty thousand dollars of said bonds of said Pima County for fifty thousand dollars of said bonds of said company, for each five miles so completed, until the two hundred thousand dollars of bonds of said Pima County are exchanged for a like number of bonds of said railroad company.

SEC. 3. The said bonds herein provided to be issued by the said County of Pima shall be issued in the name of said county, and shall be made payable to bearer twenty years after date, and shall be made payable, both principal and interest, at the office of the County Treasurer of said county issuing the same. The said bonds and coupons, in addition to being signed by the Chairman and Clerk of the Board of Supervisors of said County, shall also be signed by the Recorder of said County, who shall affix to each bond the seal of his office.

SEC. 4. The said Board of Supervisors of Pima County, issuing bonds as aforesaid, are hereby authorized and directed, at their first regular meeting, after the issuance of the same and in each year thereafter, until the said bonds are paid, in case there should not be sufficient moneys in the railroad fund provided for, to pay the annual interest upon said bonds, to levy for each year a tax sufficient to meet any deficiency in said railroad fund to pay said interest, which tax, however, shall not be more than twenty cents upon each one hundred dollars of taxable property in the above-named county, which tax shall be levied and collected in the manner as is, or may hereafter be provided by law for the levying and collecting of other Territorial and County taxes in said county, and which tax shall be known as the railroad deficiency interest tax, and the proceeds of said tax, together with the interest received by said County on the bonds of said railroad

company, held by said county, shall constitute a fund to be applied only to the payment of the interest on and redemption of the bonds provided for in this Act to be issued by said county, and shall constitute the fund heretofore mentioned and be known as the Railroad Fund.

SEC. 5. The bonds of said railroad company, hereinbefore provided for to be tendered and exchanged for the bonds of Pima County shall be secured by a deed of trust or mortgage to at least two trustees, of all the property, real and personal owned by said railroad company, at the time of the issuance of said bonds, or that may thereafter be acquired, including also, all franchises and privileges of whatsoever kind or nature, and which said deed of trust or mortgage shall be the first made of or on said property, and said bonds of said company shall be issued in the name of said company, and shall be made payable to bearer twenty years after date, and shall have interest coupons thereunto attached, and shall be made payable, both principal and interest, at the office of said company in the City of Tucson, in the County of Pima. And said deed of trust or mortgage shall provide that no more bonds than to the amount of thirteen thousand dollars per mile, to be secured by said deed of trust or mortgage, shall be issued by said railroad company.

SEC. 6. Whenever in the judgment of the Board of Supervisors of Pima County, it may be deemed advisable to sell any or all of the bonds of said railroad company, received in exchange by them, as aforesaid, they are hereby authorized and empowered to direct the Treasurer of said county to advertise in a newspaper published in said county for the space of four weeks, for sealed proposals for the purchase of any or all of said bonds of said railroad company; and ten days after the said notice shall have been published as aforesaid the Treasurer shall open the said proposals, and shall sell said bonds to the highest bidder therefor, in such lots as he may be directed by said Board of Supervisors, and the proceeds of such sale shall be placed in the said Railroad Fund to pay the interest and principal on the respective bonds of said county; *provided, however*, that the Treasurer may reject any and all bids; *and, provided further*, that no sale of such bonds shall be concluded until confirmed and approved by the Board of Supervisors by an order entered upon its minutes.

SEC. 7. Whenever, after the payment out of said Railroad Fund of the semi-annual interest on the said bonds, there shall be any money left in said Railroad Fund, it shall be the duty of the Treasurer of said County to advertise in a newspaper published in said County for the space of four weeks for sealed proposals to surrender any of the bonds of the said county, and ten days after such notice shall have been published, as aforesaid, the Treasurer shall open the said proposals and shall redeem the bonds of said county so far as the said fund on hand may be sufficient; *provided*, those offered to be surrendered at the lowest rates, shall be redeemed first; *and, provided, further*, that none shall be redeemed at a price exceeding the par value of said bonds.

SEC. 8. If, for any reason, the Board of Supervisors of the county herein named fails to meet at the times herein designated, it shall be the duty of said Board to meet on each succeeding Monday thereafter until the acts provided to be done by said Board under the provisions of this Act have been fully done and completed, and all the acts of said Board so done in the premises, subsequent to the times hereinbefore designated, shall be as valid as though done within the time hereinbefore prescribed.

SEC. 9. A copy of the articles of association certified by the Secretary of the Territory of Arizona, of the Arizona Narrow Gauge Railroad Company, and endorsed as filed by said Secretary on the 23d day of November, A. D. 1882, shall be sufficient proof to the Board of Supervisors of Pima County or officers herein named of the identification of said Arizona Narrow Gauge Railroad Company herein mentioned. The route of said road shall in all respects, so far as practicable, conform substantially to the route as set forth in the articles of incorporation of said company now on file in the office of the Secretary of this Territory.

SEC. 10. This Act shall take effect and be in force from and after its passage.

Approved February 21, 1883.

V.

List of other Statutes enacted by the several Territorial Legislatures authorizing the issue of Railroad Aid Bonds by Counties and other Municipal Corporations.

Arizona.

1. "An act to aid in the construction and maintenance of a certain railroad," approved February 13, 1879. Laws, 1879, p. 42. Provides that the Board of Supervisors of Maricopa County shall issue county bonds to the amount of $150,000, and the Board of Supervisors of Yavapai County shall issue county bonds to the amount of $250,000, to any association of persons duly incorporated under the laws of the Territory of Arizona to construct a railroad from the line of the Southern Pacific Company at Maricopa Wells to the Town of Phœnix; and thence to the Village of Prescott. Act does not apply to Pinal County. Repealed by Act Feb. 23, 1881, Laws 1881, p. 80.

2. "An act to aid in the construction of a certain railway," approved March 1, 1881. Laws 1881, p. 118. Applied to Yavapai County. Prescott and Thirty-fifth Parallel Railroad Company. Exempts property from local and county taxation. No county bonds authorized by this Act. Repealed by Laws 1883, p. 150, being Act No. 4 *infra*.

3. "An act to aid in the construction and maintenance of a certain railroad," approved March 8, 1883. Laws 1883, p. 244. Authorizes seven per cent. twenty-year bonds of Maricopa County in the sum of $60,000 to be exchanged for $60,000 bonds of such company as shall construct railroad from Phœnix to Maricopa Station on the line of the Southern Pacific Company.

4. "An act to encourage the construction of the Prescott and Thirty-fifth Parallel Railroad," approved March 6, 1883. Laws 1883, p. 150. Provides that the Prescott and Thirty-fifth Parallel Railroad Company shall receive $200,000 Yavapai County negotiable coupon twenty-year seven per cent. bonds. Repeals "An act to encourage the construction of a certain

railway," approved March 1, 1881. The county bonds, payable to said railroad company or bearer, are to be exchanged for an equal amount of paid-up unassessable capital stock.

5. "An act to aid in the construction of a certain railroad in Maricopa County," approved March 12, 1885. Laws 1885, p. 259. Provides for the issue to any person, corporation or association who shall construct the Phœnix and Wickenburg Railroad of negotiable seven per cent. thirty-year coupon bonds at the rate of $1,500 per mile of narrow gauge and $3,000 per mile of standard gauge railroad.

6. "An act to aid in the construction of a railroad in Yavapai County," approved March 12, 1885, Laws 1885, p. 193. Provides for the issue of Yavapai County bonds to any person, corporation or association who shall construct a railroad from Chino to Prescott, &c.

7. "An act to aid in the construction of a certain railroad between the City of Phœnix and the Southern Pacific Railroad," approved March 4, 1885, Laws 1885, p. 66. Provides that the Board of Supervisors of Maricopa County shall issue, pay and deliver to the Maricopa and Phœnix Railroad Company $200,000 Thirty-year seven per cent. gold coupon bonds.

8. "An act supplemental to an act entitled 'An act to aid in the construction of a certain railroad between the City of Phœnix and the Southern Pacific Railroad,' approved March 4, 1885," approved March 12, 1885; Laws 1885, p. 184. Provides that, if the Board of Supervisors of Maricopa County fail to comply with provisions of act of March 4, then Board of Railroad Commissioners thereby appointed shall carry out its provisions.

9. "An act to aid in the construction of certain railroads in the County of Gila," approved March 12, 1885, Laws 1885, p. 206. Provides that Gila County shall issue $150,000 negotiable seven per cent. coupon bonds to any person, corporation or association who shall construct a railroad from Flagstaff, in Yavapai County, to Globe, in Gila County.

Dakota.

1. "An act to fund the bonds and coupons issued by the County of Yankton under and by virtue of an act of the Legislative Assembly of the Territory of Dakota, entitled 'An act to enable organized counties and town-

ships to vote aid to any railroad and to provide for the payment of the same [approved April 21, 1871], and an Act of Congress, entitled 'An act in relation to the Dakota Southern Railroad Company,' and for other purposes" [approved May 27, 1872]. Became a law without the approval of the Governor. Laws Dakota Territory, 1881, p. 305.

2. "An act to legalize the acts of the president and trustees of the village of Dell Rapids, to increase their powers, and to authorize the issue of village bonds for railroad purposes, and to provide means of protection against loss by fire." Became a law without the approval of the Governor. Laws Dakota Territory, 1881, p. 309. Legalizes $12,500 village bonds issued to the Southern Minnesota Railway Extension Company. Authorizes $2,500 village bonds to defray expense incurred by said village for procuring the right of way for Southern Minnesota Railroad.

Montana.

1. "An act to authorize the counties interested to assist in building a railroad from the head of navigation on the Missouri River, at or near Fort Benton, to the City of Helena," approved February 11, 1876.

2. "An act to facilitate the construction of the Helena and Benton Railroad," approved February 16, 1877.

New Mexico.

1. "An act to aid in the construction of railroads," approved February 1, 1872 (Laws 1872, p. 44). Provides that any county may issue its railroad aid bonds not to exceed five percentum of assessed value of real and personal property.

This act was incorporated in full in Complied Laws New Mexico, 1884, as Title XXXIX., Railroads, §§ 2709 *et seq.*

2. "An act for the financial relief of counties and municipalities," approved February 26, 1891 (Laws 1891, p. 146).

Authorizes every county and municipality to refund its matured indebtedness.

Under said act, No. 1, we understand were issued the Santa Fe County and the Grant County, New

Mexico, railroad aid bonds, which are mentioned in the report of the Senate Committee at the time the Harrison act was passed. See Extracts from Report, this Appendix, *supra*. See, also, Act of Congress of January 16, 1897, 29 Stat., 487, validating said railroad aid bonds and funding bonds issued therefor under said act No. 2, and authorizing further refunding.

Washington.

The Thurston County, Washington Territory, Railroad Aid bonds mentioned in the report of the Senate Committee at the time of the Harrison Act (See this Appendix, *supra*) seem to have been authorized directly by Act of Congress (See Act of Congress, approved May 27, 1874 ; 18 Stat., 48).

Wyoming.

1. "An act to authorize the Board of County Commissioners of Laramie County to issue the bonds of said county to the Wyoming, Montana and Pacific Railroad Company," approved December 12, 1879 ; Laws 1879, p. 24. Repeals "An act to authorize the Board of County Commissioners of Laramie County to issue the bonds of said county to the said Colorado Central Railroad Company and for other purposes," approved December 14, 1877, in case said bonds are issued to said first-named company.

2. "An act to amend an act, entitled 'An act to authorize the Board of County Commissioners of Laramie County to issue the bonds of said county to the Wymoning, Montana and Pacific Railroad Company," approved Feb. 28, 1882 (Laws 1882, p. 25). Amends foregoing act by inserting the proviso that said company shall expend $20,000 by January 1, 1883, for machine shops, and shall complete one hundred miles of said railroad by November 1, 1883. In case said railroad company fail, then County Commissioners may issue $300,000 similar bonds to any other such railroad company.

3. "An act to authorize counties in the Territory of Wyoming to issue bonds for the purpose of aiding the construction of railways," approved February 27, 1886 (Laws 1886, p. 64).

VI.

Harrison Act of Congress, approved July 30, 1886.

An act to prohibit the passage of local or special laws in the Territories of the United States, to limit Territorial indebtedness, and for other purposes (24 Stat., 170).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:

Granting divorces.

Changing the names of persons or places.

Laying out, opening, altering, and working roads or highways.

Vacating roads, town-plats, streets, alleys and public grounds.

Locating or changing county seats.

Regulating county and township affairs.

Regulating the practice in courts of justice.

Regulating the jurisdiction and duties of justices of the peace, police magistrates and constables.

Providing for changes of venue in civil and criminal cases.

Incorporating cities, towns or villages, or changing or amending the charter of any town, city or village.

For the punishment of crimes or misdemeanors.

For the assessment and collection of taxes for Territorial, county, township or road purposes.

Summoning and impaneling grand or petit jurors.

Providing for the management of common schools.

Regulating the rate of interest on money.

The opening and conducting of any election or designating the place of voting.

The sale or mortgage of real estate belonging to minors or others under disability.

The protection of game or fish.

Chartering or licensing ferries or toll bridges.

Remitting fines, penalties or forfeitures.

Creating, increasing or decreasing fees, percentage or allowances of public officers during the term for which said officers are elected or appointed.

Changing the law of descent.

Granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for such purpose.

Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.

In all other cases where a general law can be made applicable, no special law shall be enacted in any of the Territories of the United States by the Territorial legislatures thereof.

SEC. 2. That no Territory of the United States now or hereafter to be organized, or any political or municipal corporation or subdivision of any such Territory, shall hereafter make any subscription to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association, or borrow any money for the use of any such Company or association.

SEC. 3. That no law of any Territorial legislature shall authorize any debt to be contracted by or on behalf of such Territory except in the following cases: To meet a casual deficit in the revenues, to pay the interest upon the Territorial debt, to suppress insurrections, or to provide for the public defense, except that in addition to any indebtedness created for such purposes, the legislature may authorize a loan for the erection of penal, charitable or educational institutions for such Territory, if the total indebtedness of the Territory is not thereby made to exceed one per centum upon the assessed value of the taxable property in such Territory as shown by the last general assessment for taxation. And nothing in this act shall be construed to prohibit the refunding of any existing indebtedness of such Territory or of any political or municipal corporation, county or other subdivision therein.

SEC. 4. That no political or municipal corporation, county, or other subdivision in any of the Territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within

such corporation, county, or subdivision, to be ascertained by the last assessment for Territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void: **That nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law, nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation or subdivision of any territory as to any bonds heretofore issued or contracted to be issued.**

SEC. 5. That section eighteen hundred and eighty-nine, title twenty-three, of the Revised Statutes of the United States, be amended to read as follows:

"The legislative assemblies of the several Territories shall not grant private charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing and other industrial pursuits, and for conducting the business of insurance, banks of discount and deposit (but not of issue), loan, trust and guarantee associations, and for the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvements of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable or scientific association."

SEC. 6. That nothing in this act contained shall be construed to abridge the power of Congress to annul any law passed by a Territorial Legislature, or to modify any exising law of Congress requiring in any case that the laws of any Territory shall be submitted to Congress.

SEC. 7. That all acts and parts of acts hereafter passed by any Territorial Legislature in conflict with the provisions of this act shall be null and void.

Approved July 30, 1886.

VII.

Territorial Funding Act enacted by the Legislative Assembly of the Territory of Arizona, approved March 10, 1887.

[Revised Statutes of Arizona, 1887, p. 361.]

TITLE XXXI.

FUNDING.

CHAPTER ONE.

Territorial Indebtedness.

[Approved March 10, 1887.]

2039 (SEC. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona, the governor of the said Territory, together with the Territorial auditor and Territorial secretary and their successors in office shall constitute a board of commissioners, to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

2040 (SEC. 2.) It shall be, and is hereby, declared the duty of the loan commissioners to provide for the payment of the existing Territorial indebtedness due, and to become due, and for the purpose of paying, redeeming and refunding all or any part of the principal and interest, or either of the existing and subsisting Territorial legal indebtedness, and also that which may at any time become due, the said commissioners shall, from time to time, issue negotiable coupon bonds of this Territory, when the same can be done at a lower rate of interest and to the profit and benefit of the Territory.

2041 (SEC. 3.) Said bonds shall be issued as near as practicable in denominations of one thousand dollars, but bonds of a lower denomination, not less than two hundred and fifty dollars, may be issued when necessary. Said bonds shall bear interest at a rate to be

fixed by said loan commissioners, but in no case to exceed six and one-half ($6\frac{1}{2}$) per cent. per annum, which interest shall be paid in gold coin, or its equivalent in lawful money of the United States, on the fifteenth day of January in each year, at the office of the Territorial treasurer, or at such bank in the city of New York, in the State of New York, or in the city of San Francisco, in the State of California, as may be designated by said loan commissioners, at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States within twenty-five years after the date of their issue.

They shall bear the date of their issue, state when, where and to whom payable, rate of interest, and when and where payable, and shall be signed by said loan commissioners, and shall have the seal of the Territory affixed thereto, and countersigned by the Territorial treasurer, and bear his official seal, and shall be registered by the Territorial auditor in a book to be kept by him for that purpose, and the faith and credit of the Territory is hereby pledged for the payment of said bonds and the interest accruing thereon as herein provided.

2042 (SEC. 4.) Coupons for the interest shall be attached to each bond, so that they may be removed without injury or mutilation to bond.

They shall be consecutively numbered and bear the same number of the bond to which they are attached, and shall be signed by the Territorial treasurer.

The said coupons shall cover the interest expressed in said bond from the date of issue until paid; but in no case shall said bonds bear interest, nor shall any interest be paid thereon for any time before their delivery to the purchaser as hereinafter provided.

2043 (SEC. 5.) Whenever the said loan commissioners shall have decided to refund or redeem all or any part of the existing indebtedness of this Territory, they shall direct the Territorial treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published for the period of one month in some daily newspaper published at the capital of the Territory, and at least one insertion in a newspaper published in the city of New York, in the State of New York, and in the city of San Francisco, in the State of California; such notice shall specify the amount of bonds to be sold, the rate

of interest they shall bear, the place, day and hour of sale, and that bids will be received by said treasurer for the purchase of said bonds within one month from the expiration of said publication ; and at the place and time named in said notice, the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof, to the highest bidder or bidders therefor : *Provided*, That said loan commissioners shall have the right to reject any and all bids : *And Provided Further*, That they may refuse to make any award unless sufficient security shall be furnished by the bidder or bidders for the compliance with the terms of their bids.

2044 (SEC. 6.) When a sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds as in this act provided, and any expense incurred by them therefor, for the publication of said notices, costs of remitting funds for the payment of interest or money on said bonds, and all other necessary incidental expenses under the provisions of this act, shall be paid out of the general fund of said Territory, upon the order of the Territorial auditor, and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund.

They shall from time to time, after signing said bonds, deliver them to the Territorial treasurer, taking his receipt therefor, and charge him therewith. The said treasurer shall give to the Territory of Arizona an additional official bond, with two or more sureties, in a sum equal to the amount of bonds issued under this act, delivered to him by the said loan commissioners, which bond shall be approved by the governor and deposited and filed with the secretary of the Territory and recorded by him in a book to be kept for that purpose. And the said treasurer shall stand charged upon his official bond for the faithful performance of the duties required of him under this act.

2045 (SEC. 7.) The Territorial treasurer shall sell said bonds for cash or exchange them for any of the Territorial indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any Territorial indebtedness be redeemed at more than its face value and any interest that may be due thereon.

The said treasurer shall indorse, by writing or stamping in ink on the face of the paper evidencing the indebtedness received by him in exchange for said bonds, the time when and the amount for which exchanged.

2046 (SEC. 8.) All moneys so received by said treasurer from a sale of such bonds shall be applied by him exclusively to the redemption of the Territorial indebtedness for the redemption of which such bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of Territorial warrants of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease.

2047 (SEC. 9.) There shall be levied annually upon the taxable property in this Territory, and in addition to the levy for other authorized taxes a sufficient sum to pay the interest on all bonds issued and disposed of in pursuance of the provisions of this Act to be placed by the Territorial treasurer in a fund to be known as the "Interest Fund." And ten years after such bonds shall have been issued such additional amount shall be levied annually as will pay ten per cent. of the total amount issued until all the bonds issued under the provisions of this act are paid and discharged.

The Territorial board of equalization, if there be one, if not, then the Territorial auditor, shall determine the rate of tax to be levied in the different counties in the Territory to carry out the provisions of this act, and shall certify the same to the "board of supervisors" in each county; and the said board of supervisors are hereby directed and required to enter such rate on the assessment role of their respective counties, in the same manner and with the same effect as is provided by law in relation to other Territorial and county taxes. Every tax levied under the provisions or authority of this act is hereby made a lien against the property assessed, which lien shall attach on the first Monday in March in each year, and shall not be satisfied or removed until such tax has been paid.

All moneys derived from taxes authorized by the provisions of this act shall be paid into the Territorial treasury and shall be applied—

First. To the payment of the interest on the bonds issued hereunder.

Second. To the payment of the principal of such bonds: *Provided*, That all moneys remaining in the

"interest fund" after the payment of the interest in each year, for the first ten years after the issuance of any bonds under this act, and all moneys remaining in the "redemption fund" after all said bonds shall have been paid and discharged shall be transferred by the Territorial treasurer to the Territorial general fund.

2048 (SEC. 10.) Whenever, after the expiration of the ten years from the date of issuance of any bonds under this act there remains after the payment of the interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the duty of the Territorial treasurer to advertise as in manner of the advertising by the loan commissioners for bids for sale of bonds, which advertisement shall state the amount of money in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which said fund is set apart to pay and discharge; and if such bonds so numbered in such advertisements shall not be presented for payment and cancellation at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the Territorial auditor, who shall indorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The Territorial auditor shall keep a record of all bonds issued and disposed of by the Territorial treasurer, showing their number, rate of interest, date, and amount of sale, when, where, and to whom payable, and, if exchanged, for what, and when presented for redemption, the date, amount due thereon, and person surrendering.

2049 (SEC. 11.) When the treasurer pays or redeems any Territorial indebtedness he shall indorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words "redeemed and canceled," with the date of cancellation. He shall keep a full and particular account and record of all his proceedings under this act and of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings under this act with his annual report, to be by the governor laid before the legislature at its meeting. All books and papers pertaining to the matter provided in

this act shall at all times be open to the inspection of the party interested, or the governor, or a committee of either branch of the legislature, or a joint committee of both.

2050 (SEC. 12.) It shall be the duty of the Territorial treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient; and if said fund be not sufficient, then to pay the deficiency out of the general fund: *Provided*, That the Territorial auditor shall first draw his warrant on the Territorial treasurer, payable to the order of said treasurer, for the amount of such deficiency, out of the general fund, which said interest warrant shall be drawn at least one month previous to the maturing of the interest.

2051 (SEC. 13.) It shall be the duty of said board of loan commissioners to make a full report of all their proceedings had under the provisions of this act to the governor on or before the first day of January of each year, and said reports shall be transmitted by the governor to the Territorial legislative assembly.

2052 (SEC. 14.) No bond issued under the provisions of this act shall be taxed within this Territory.

[Took effect immediately.]

NOTE.—There was also an Act of the Territory of Arizona, approved March 2, 1887, being "Chapter Two" of said "Title XXXI.—Funding," which said act provided for the funding or refunding of county indebtedness by the board of supervisors of the county, and the issuing of county bonds for that purpose. The scheme of the said Chapter Two of funding county indebtedness by the issue of county bonds was superseded by the Act of Congress of June 25, 1890 (which is the next Act printed in this Appendix), providing for the funding of county bonds by the issue, not of county bonds, but of Territorial bonds, under and in accordance with the provisions of the said Act of Congress of June 25, 1890, amending said "Title XXXI.—

Funding," and providing that, as amended, the same " is hereby approved and confirmed, subject to future Territorial legislation," which future Territorial legislation is embodied in the Funding Act of the Territory of Arizona, approved March 19, 1891, printed in this Appendix, *post*, p. 85.

VIII.

Act of Congress approved June 25, 1890.

An Act approving, with amendments, the funding act of Arizona (26 Stat. 175).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

That the act of the Revised Statutes of Arizona of eighteen hundred and eighty-seven, known as "Title XXXI., Funding," be, and is hereby amended so as to read as follows, and that as amended the same is hereby approved and confirmed, subject to future Territorial legislation:

" TITLE XXXI.—FUNDING AND LOAN.

" Chapter One.

" TERRITORIAL, COUNTY, MUNICIPAL AND SCHOOL DISTRICT INDEBTEDNESS.

" Par. 2039 (Sec. I.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona and such future indebtedness as may be or is now authorized by law, the governor of the said Territory, together with the Territorial auditor and Territorial secretary and their successors in office, shall constitute a board of commissioners, to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

"Par. 2040 (Sec. 2.) It shall be, and is hereby, declared the duty of the loan commissioners to provide for the payment of the existing Territorial indebtedness due, and to become due, or that is now, or may be hereafter, authorized by law and for the purpose of paying, redeeming, and refunding all or any part of the principal and interest, or either of the existing and subsisting Territorial legal indebtedness, and also that which may at any time become due or is now or may be hereafter authorized by law, the said commissioners shall, from time to time, issue negotiable coupon bonds of this Territory, when the same can be done at a lower rate of interest and to the profit and benefit of the Territory.

"Par. 2041 (Sec. 3). Said bonds shall be issued as near as practicable in denominations of one thousand dollars, but bonds of a lower denomination, not less than two hundred and fifty dollars, may be issued when necessary. Said bonds shall bear interest at a rate to be fixed by said loan commissioners, but in no case to exceed five per centum per annum, which interest shall be paid in gold coin, or its equivalent in lawful money of the United States, on the fifteenth day of January in each year, at the office of the Territorial treasurer, or at such bank in the city of New York, in the State of New York, or in the city of San Francisco, in the State of California, or such place as may be designated by the said loan commissioners, at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States fifty years after the date of their issue. Said Territory reserves the right to redeem at par any of said bonds, in their numerical order, at any time after twenty years after the date thereof.

"They shall bear the date of their issue, state when, where, and to whom payable, rate of interest, and when and where payable, and shall be signed by said loan commissioners, and shall have the seal of the Territory affixed thereto, and countersigned by the Territorial treasurer, and bear his official seal, and shall be registered by the Territorial auditor in a book to be kept by him for the purpose, which shall state amount sold for, or, if exchanged, for what; and the faith and credit of the Territory is hereby pledged for the payment of said bonds and the interest accruing thereon, as herein provided.

"Par. 2042 (Sec. 4). Coupons for the interest shall be attached to each bond, so that they may be removed without injury to or mutilation of bond.

"They shall be consecutively numbered and bear the same number of the bond to which they are attached, and shall be signed by the Territorial treasurer.

"The said coupons shall cover the interest expressed in said bond from the date of issue until paid; but in no case shall bonds bear interest, nor shall any interest be paid thereon for any time before their delivery to the purchaser, as hereinafter provided.

"Par. 2043 (Sec. 5). Whenever the said loan commissioners may be authorized by law to issue bonds, or shall have decided to refund or redeem all or any part of the existing indebtedness of this Territory, they shall direct the Territorial treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published for the period of one month in some daily newspaper published at the capital of the Territory, and at least one insertion in a newspaper published in the city of New York, in the State of New York, and in the city of San Francisco, in the State of California; such notice shall specify the amount of bonds to be sold, the place, day and hour of sale, and that bids will be received by said treasurer for the purchase of said bonds within one month from the expiration of said publication; and at the place and time named in said notice, the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof to the bidder or bidders therefor bidding the lowest rate of interest: *Provided*, That said loan commissioners shall have the right to reject any and all bids: *And Provided Further*, That they may refuse to make any award unless sufficient security shall be furnished by the bidder or bidders for the compliance with the terms of their bids.

"Par. 2044. (Sec. 6.) When the sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds as in this act provided, and any expense incurred by them therefor, for the publication of said notices, costs of remitting funds for the payment of interest or money on said bonds, and all other necessary incidental expenses under the provisions of this act, shall be paid out of

the general fund of said Territory, upon the order of the Territorial auditor, countersigned by the governor; and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund.

"They shall from time to time, after signing said bonds, deliver them to the Territorial treasurer, taking his receipt therefor, and charge him therewith. The said treasurer shall give to the territory of Arizona an additional official bond, with two or more sureties, in a sum equal to the amount of bonds delivered to him by the said loan commissioners, which bond shall be approved by the governor and deposited and filed with the secretary of the Territory and recorded by him in a book to be kept for that purpose. And the said treasurer shall stand charged upon his official bond for the faithful performance of the duties required of him under this act.

" Par. 2045 (Sec. 7). The Territorial treasurer shall sell said bonds for cash or exchange them for any of the indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any indebtedness be redeemed at more than its face value and any interest that may be due thereon.

" That said treasurer shall endorse, by writing or stamping in ink on the face of the paper evidencing the indebtedness received by him in exchange for said bonds, the time when and the amount for which exchanged.

" Par. 2046 (Sec. 8). Moneys received by said treasurer shall be applied by him to the redemption of the indebtedness for the redemption of which bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of Territorial warrants of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease.

Before any such indebtedness shall be paid the Territorial auditor shall indorse on each certificate the amount due thereon, and shall write across the face of each the date of its surrender and the name of the person surrendering, and shall keep proper record thereof.

" Par. 2047 (Sec. 9). There shall be levied annually upon the taxable property in this Territory, and in

addition to the levy for other authorized taxes a sufficient sum to pay the interest on all bonds issued and disposed of in pursuance of the provisions of this Act to be placed in the Territorial treasury in the fund to be known as the 'Interest Fund.' And fifty years after such bonds shall have been issued such additional amount shall be levied annually as will pay ten per cent. of the total amount issued until all the bonds issued under the provisions of this act are paid and discharged; nothing herein contained shall be construed to prevent the legislature of Arizona from creating a sinking fund during the life of said bonds for their redemption at maturity.

"The Territorial board of equalization, or, on their failure, the Territorial auditor, shall determine the rate of tax to be levied in the different counties in the Territory to carry out the provisions of this act, and shall certify the same to the 'board of supervisors' in each county and to the municipal or school authorities; and the said board of supervisors or authorities are hereby directed and required to enter such rate on their assessment rolls in the same manner and with the same effect as is provided by law in relation to other Territorial, county, municipal and school taxes. Every tax levied under the provisions of authority of this act is hereby made a lien against the property assessed, which lien shall attach on the first Monday in March in each year, and shall not be satisfied or removed until such tax has been paid.

"All moneys derived from taxes authorized by provisions of this act shall be paid into the Territorial treasury and shall be applied—

"FIRST. To the payment of the interest on the bonds issued hereunder.

"SECOND. To the payment of the principal of such bonds: *Provided*, That all moneys remaining in the interest fund after the payment of the interest and all moneys remaining in the 'redemption fund' after all said bonds shall have been paid and discharged shall be transferred by the Territorial treasurer to the Territorial 'general fund.'

"Par. 2048 (Sec. 10). Whenever, after the expiration of the fifty years from the date of issuance of any bonds under this act there remains after the payment of the interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the duty of the Territorial treasurer to advertise as

in the manner of advertising by the loan commissioners for bids for sale of bonds, which advertisement shall state the amount of money in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which such fund is set apart to pay and discharge; and if such bonds so numbered in such advertisement shall not be presented for payment and cancellation at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the Territorial auditor, who shall indorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The Territorial auditor shall keep a record of all bonds issued and disposed of by the Territorial treasurer, showing their number, rate of interest, date, and amount of sale, when, where, and to whom payable, and if exchanged, for what, and when presented for redemption, the date, amount due thereon, and person surrendering.

"The boards of supervisors of the counties, the municipal and school authorities, are hereby authorized and directed to report to the loan commissioners of the Territory their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the municipal or school authorities, of their bonded and outstanding indebtedness, and said loan commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness, upon the official demand of said authorities, in the same manner as other Territorial indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may be hereafter allowed by law to said county, municipality or school district, upon official demand by said authorities; the county, municipality or school district to pay into the Territorial treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the Territorial board of equalization, or on their failure by the Territorial auditor to be levied for the payment of the principal of the bonds issued in redemption, refunding or other bonds issued to such

county, municipality or school district when the same shall become due and in addition a rate of interest paid by the Territory on such bonds.

" Par. 2049 (Sec. 11). When the treasurer pays or redeems any indebtedness he shall indorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words 'redeemed and canceled,' with the date of cancellation. He shall keep a full and particular account and record of all his proceedings under the act and of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings under this act with his annual report, to be by the governor laid before the legislature at its meeting. All books and papers pertaining to the matter provided in this act shall at all times be open to the inspection of the party interested, or to the governor, or a committee of either branch of the legislature, or a joint committee of both.

" Par. 2050 (Sec. 12). It shall be the duty of the Territorial treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient; and if said fund be not sufficient, then to pay the deficiency out of the general fund: *Provided*, That the Territorial auditor shall first draw his warrant on the Territorial treasurer, payable to the order of said treasurer, for the amount of such deficiency, out of the general fund.

" Par. 2051 (Sec. 13). It shall be the duty of said loan commissioners to make a full report of all their proceedings had under the provisions of this act to the governor on or before the first day of January of each year, and said reports shall be transmitted by the governor to the Territorial legislative assembly.

" Par. 2052 (Sec. 14). No bond issued under the provisions of this act shall be taxed within this Territory.

Sec. 15. That nothing in this act shall be construed to authorize any future increase of any indebtedness in excess of the limit prescribed by the 'Harrison act': *Provided, however*, That the present existing and outstanding indebtedness, together with such warrants as may be issued for the necessary and current expenses of carrying on Territorial, county, municipal and school government for the year ending December thirty-first, eighteen hundred and ninety, may also be funded and bonds issued for the redemp-

tion thereof; and thereafter no warrants, certificates or other evidences of indebtedness shall be allowed to issue or be legal where the same is in excess of the limit prescribed by the 'Harrison Act.'

That all acts or parts of acts in conflict with this act are hereby repealed.

Approved June 25, 1890.

IX.

Territorial Funding Act of Arizona, Approved March 19, 1891.

An Act to provide for funding Territorial, County and other indebtedness and being supplemental to the Act of Congress entitled "An Act Approving with Amendments the Funding Act of Arizona," approved June 25, 1890.

[Laws Territory of Arizona, 1891, p. 120].

Be it enacted by the Legislative Assembly of the Territory of Arizona.

SECTION 1. That the Act of Congress entitled "An Act Approving with Amendments the Funding Act of Arizona," approved June 25th, 1890, be, and the same is hereby, now re-enacted as of the date of its approval, subject to the modifications and additional provisions hereinafter set out, and to carry out the purpose and intention of said Act of Congress, the loan commissioners of the Territory of Arizona shall provide for the liquidation, funding and payment of the indebtedness existing and outstanding on the 31st day of December, 1890, of the Territory, the counties, municipalities and school districts within said Territory, by the issuance of bonds of said Territory, as authorized by said Act, and all bonds issued under the provisions of this Act and the interest thereon shall be payable in gold coin of the United States.

SEC. 2. Whenever the said loan commissioners shall redeem, refund or pay any indebtedness of a county,

municipality or school district, or issue bonds to such county, municipality or school district as authorized by said act of Congress, the Territorial Treasurer shall open and keep an account with said county, municipality or school district, and shall at once make out and transmit to the proper officer or officers charged with the administration of the affairs of said county, municipality or school district, a statement under his official seal, showing the amount and character of the indebtedness of said county, municipality or school district, refunded or paid the amount of bonds issued therefor, when due and payable, rate of interest and amount of interest that will be required to be paid annually thereon. And said officer or officers shall file said statement in the proper office as a record therein.

SEC. 3. In all cases of funding and paying the indebtedness of any county or school district in such county, the Board of Supervisors of such county, or, of funding and paying the indebtedness of any municipality, the Executive or other proper officer or officers of such municipality, shall annually, at the time of assessing and levying taxes therein, cause to be assessed and levied each year upon the taxable property of the county in case of county indebtedness, municipality in case of municipal indebtedness, and school district in case of school district indebtedness, and in addition to other authorized taxes, a sufficient sum to pay the interest on the bonds issued and disposed of under the provisions of this Act, for the benefit of such county, municipality or school district respectively. And fifty (50) years after such bonds shall have been issued, such additional amount shall be levied, annually, as will pay ten per cent. of the total amount issued until all the bonds issued under the provisions of this Act are paid. And all taxes shall be assessed, levied and collected as other county, municipal and school district taxes are collected, and shall be paid into the Territorial Treasury.

SEC. 4. If sufficient money shall not be realized each year from the collection of taxes to pay the interest on said bonds when due, the deficiency shall be paid out of the money, fund or funds, used for defraying the general expenses of such county, municipality or school district, for the funding, redemption and payment of whose indebtedness said bonds were issued, which said deficiency shall be paid

by the proper officer or officers in charge of said money, fund or funds, upon the official demand thereof by the Territorial Treasurer. All money collected in any county, municipality or school district, for the payment of said interest remaining after such payment, shall be paid into said fund or funds used for the general expenses of such county, municipality or school district.

SEC. 5. It shall be the duty of the respective county, municipality and school district officers, whose duty it is to levy and collect the taxes therein, to levy and collect the tax in this Act provided for the payment of the principal and interest of said bonds when due and payable and to pay the same into the Territorial Treasury at the time and times of the payment of the Territorial taxes. Any failure to comply with the conditions and provisions of this Act by any officer or officers charged with the performance thereof, or any neglect or refusal by him or them to levy, collect or pay over such taxes as aforesaid, or to apply the money collected under this Act otherwise than for the purpose for which it was collected, shall be deemed a misdemeanor, and upon conviction in a court having jurisdiction thereof, the person so convicted shall be fined in an amount equal to the sum that should have been levied and collected, or for any misappropriation of the moneys so collected, in an equal amount to the sum not applied as in this Act provided, and imprisoned as in other cases of misdemeanor, in the discretion of the court. And if the said proper officer or officers shall fail to levy the taxes as in this Act provided, he or they may be compelled to perform such duty by any court having jurisdiction thereof. Provided, that in such case of failure, the Territorial Board of Equalization, or, upon their failure to act, the Territorial Auditor shall levy sufficient taxes in the different counties, municipalities and school districts to carry out the provisions of this Act and the Act of which this is supplemental. Said Board and Auditor, or either of them, may require the proper officer or officers of the county, municipality or school district whose indebtedness has been refunded, and it shall be their duty to furnish said Board or Auditor such information as will enable said Board or Auditor to carry out the provisions of this Act and said Act of Congress. When the tax is so levied by the Territorial

Board of Equalization or Territorial Auditor, he or they shall transmit to the Board of Supervisors, in the case of the county and school district tax, and to the proper officers in case of municipal tax, or to such other officer or officers exercising like duties, a statement of the rate of taxes fixed and levied upon the property within said county, municipality or school district, for the purpose aforesaid, and the proper county, municipal and school district officers shall enter upon the tax roll and proceed to collect the tax levied, as other county, municipal and school district taxes are collected.

SEC. 6. The Board of Supervisors of each county shall fix and define the boundaries of each school district within the county, and all taxable property and the increase thereof, within the limits of each county, municipality or school district, is hereby pledged to the payment of any and all bonds and the interest thereon issued for the benefit of such county, municipality or school district respectively. And in the event of the division, disincorporation or dissolution in any manner of any such county, municipality or school district, the Board of Supervisors of each county, or other board of officers exercising the like duties, and in case of their failure to act, then the Territorial Board of Equalization, and upon their failure to act the Territorial Auditor or other officer exercising the like duties, shall cause the proper taxes to be assessed and levied upon the taxable property within the limits of such county, municipality or school district, at and from the time of the issuance of the bonds for its benefit, to meet the payment of such bonds and the interest thereon.

SEC. 7. **Any person holding bonds, warrants or other evidence of indebtedness of the Territory or any county, municipality or school district within the Territory, existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this Act at not less than their face or par value and the accrued interest at the time of exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon.**

SEC. 8. The provisions of said Act of Congress relating or applying to the liquidation, refunding and re-

deeming of the Territorial indebtedness, sale or exchange of bonds, receiving and applying the proceeds; shall apply and be the method used for the liquidation, refunding and redeeming the payment of the indebtedness of the counties, municipalities and school districts of this Territory authorized and contemplated by said Act. And the loan commissioners shall, at no time, issue to any county, municipality or school districts any bonds created under this Act or said Act of Congress, without requiring from the officer or officers receiving the same, a bond, as is required of the Territorial Treasurer, by section 6 of said Act of Congress; and the said officer or officers shall give such bond, and no bonds shall be issued to any county, municipality or school district except in exchange for the bonds, warrants or other evidences of indebtedness for the redemption of which the refunding bonds were issued.

SEC. 9. Each county, municipality and school district shall pay into the Territorial Treasury its *pro rata* of the costs and expenses incurred and paid by the Territory for the refunding, redeeming and payment of the indebtedness of said county, municipality or school district.

SEC. 10. This Act shall take effect and be in force from and after its passage.

Approved March 19, 1891.

X.

An act to amend an act entitled "An act approving with amendments the funding act of Arizona," approved June twenty-fifth, eighteen hundred and ninety.

[27 Stat., 87.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section three of said act be, and is so amended that the interest upon the bonds provided for in said act shall be payable semi-annually, on the

fifteenth days of January and July in each year, and that no further Territorial legislation shall be necessary to make said Territory liable for the principal and interest of said bonds; and no further advertisement for the sale of one million five hundred thousand dollars of said bonds, at not less than par, shall be necessary.

Approved July 13, 1892.

XI.

An Act to amend section fifteen of an Act approving, with amendments, the funding Act of Arizona approved June twenty-fifth, eighteen hundred and ninety.

[28 Stat., 224.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an Act entitled "An Act approving, with amendments, the funding Act of Arizona," approved June twenty-fifth, eighteen hundred and ninety, and paragraph twenty hundred and fifty-two (section fifteen), of said Act, be, and the same is hereby, amended by adding thereto as follows:

"*Provided further, however*, That the present outstanding warrants, certificates, and other evidences of indebtedness issued subsequent to December thirty-first, eighteen hundred and ninety, for the necessary and current expenses of carrying on the Territorial government only, together with such warrants as may be issued for such purpose for the years ending December thirty-first, eighteen hundred and ninety-four, and December thirty-first, eighteen hundred and ninety-five, may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates or other evidences of indebtedness shall be allowed to issue or be legal where the same is in excess of the limit prescribed by the 'Harrison Act.'"

SEC. 2. That all Acts or parts of Acts in conflict with this Act are hereby repealed.

Approved August 3, 1894.

XII.

Act of Congress approved June 6, 1896.

[29 Stat., 262.]

The Act of Congress approved June 6, 1896, validating the bonds in question and authorizing them to be refunded is printed at large in the body of the brief, page 30.



Supreme Court of the United States.

No. 388.—October Term, 1901.

Nathan O. Murphy et al., Appellants, vs. James L. Utter et al. } On appeal from the Supreme Court of the Territory of Arizona.

[May 19, 1902.]

This was an appeal by the Loan Commissioners of Arizona from a judgment of the Supreme Court of that Territory rendered March 22, 1901, granting a peremptory writ of mandamus and commanding such Loan Commissioners, upon the tender by plaintiffs of $150,000 bonds of the county of Pima with coupons attached, described in the petition, to issue and deliver to the petitioners refunding bonds of the Territory pursuant to certain acts of Congress.

The facts of the case are substantially as follows: By an act of the legislature of Arizona of February 21, 1883, the county of Pima in that Territory was authorized to issue $200,000 of bonds in aid of the construction of the Arizona Narrow Gauge Railroad Company, to which company the bonds were made payable. The entire issue was declared to be void by this court in *Lewis* v. *Pima County*, (155 U. S. 54.) This decision was pronounced in October, 1894.

Prior to this decision, however, owing to doubts that were entertained as to the validity of bonds issued in aid of railroads, the legislature of Arizona in 1887 and Congress in 1890 passed certain acts authorizing the refunding of Territorial bonds, which had been authorized by law, and in compliance with a memorial submitted by the legislature of Arizona, Congress passed a further act in 1896 authorizing the refunding of all outstanding bonds of the Territory, and its municipalities, which had been authorized by legislative enactments, and also confirming and validating the original bonds, which by the first section were authorized to be refunded.

Thereupon, and on December 31, 1896, James L. Utter and Elizabeth B. Voorhies filed the petition involved in this case for a writ of mandamus to compel the Loan Commissioners to issue refunding bonds in exchange for those originally issued by the county of Pima in aid of the Narrow Gauge Railroad Company. Defendants demurred to the petition, and for answer thereto averred that the bonds of Pima County, held by the petitioners, had been declared both by the Supreme Court of the Territory and by this court to be void, and therefore that the petition should be

dismissed. They also interposed a plea of *res adjudicata*. The petition being denied by the Supreme Court of Arizona, the relators appealed to this court, which reversed the order of the Supreme Court of the Territory, and remanded the case to that court for further proceedings. (*Utter* v. *Franklin*, 172 U. S. 416.) This decision was made in January, 1899.

Thereupon, and on June 1, 1899, after the case was remanded to the Supreme Court of Arizona, respondents, by leave of the court, filed an amended return to the effect that the bonds and coupons sought to be refunded were not delivered by any one authorized by Pima County to do so; that the county never acknowledged the validity of the bonds or paid interest thereon; that the railroad, the construction of which the legislature intended to promote, by the issue of the bonds, was never constructed, equipped or operated; that Pima County never received any consideration whatever for the bonds; that they had been declared void by this court; that petitioners were not innocent holders of them; that the bonds and coupons were not sold or exchanged in good faith, and in compliance with the act of the legislature by which they were authorized, and that they were not intended to be included, and were not included, in the act of Congress of 1896, or any act or memorial of the legislative assembly of the Territory. The return also set up the statute of limitations; that the personnel of the Loan Commission had been wholly changed; that the act authorizing the employment of Loan Commissioners had been repealed and no longer existed, and numerous defenses which had not been made or set up in the original answer or return.

Petitioners thereupon moved to strike the amended return from the files on the ground that the same had been filed without leave of the court, and that under the decision of this court in *Utter* v. *Franklin* no new defenses could be considered. The Supreme Court of the Territory, however, overruled the motion and permitted the amended return to be filed, to which ruling petitioners excepted. But instead of applying to this court for a writ of mandamus to carry its mandate into effect, they proceeded with the case in the Supreme Court of the Territory, and filed a reply to the amended return. A referee was appointed, testimony taken and the Supreme Court of the Territory made a finding of facts set out in the record, and awarded a peremptory writ of mandamus directing the refunding of the bonds. From this judgment defendants appealed to this court.

Meantime, however, Elizabeth B. Voorhies, one of the petitioners, had died, and her executors were ordered by this court to be substituted.

Mr. Justice Brown delivered the opinion of the Court.

While upon the former hearing of this case, under the name of *Utter* v. *Franklin*, (172 U. S. 416,) the order of the Supreme Court of Arizona

denying a writ of mandamus was reversed and the case remanded for further proceedings, we expressed the opinion "that it was made the duty of the Loan Commissioners by these acts to fund the bonds in question." The logical inference from this was that a writ of mandamus should issue at once. True, the case was argued upon demurrer, but as the demurrer was accompanied by a plea of *res adjudicata*, which was expressly held to be untenable, (page 424,) it is a serious question whether the defendant should have been permitted to set up new defenses without the leave of this court. (*In re Potts*, 166 U. S. 263, 267; *Ex parte Union Steamboat Co.*, 178 U. S. 317; *Supervisors* v. *Kennicott*, 94 U. S. 498; *New Orleans* v. *Warner*, 180 U. S. 199, 203; *Stewart* v. *Salamon*, 94 U. S. 434; *Gaines* v. *Rugg*, 148 U. S. 228.) The reason for such a course applies with special cogency to this case in view of the statute of Arizona, (Rev. Stat. 1887, sec. 734,) declaring that the "defendant in his answer may plead as many several matters, whether of law or fact, as may be necessary for his defense, and which may be pertinent to the cause, but such pleas shall be stated in the following order and filed at the same time: 1. Matters denying the jurisdiction of the court. 2. Matters in the abatement of a suit. 3. Matters denying the sufficiency of the complaint, or of any cause of action therein, by demurrer, general or special. 4. Matters of counterclaim and set-off."

Of the numerous defenses upon the merits set up in the amended return, but two are pressed upon our attention, namely, whether the petition abated by a change of the personnel of the Loan Commission, or by a repeal of the act abolishing the commission altogether.

1. The court was correct in holding that the change in the personnel of the commission did not abate the proceeding, which was not taken against the individuals as such, but in their official capacity as Loan Commissioners. The original petition was entitled and brought by Utter and Voorhies, plaintiffs, against "Benjamin J. Franklin, C. P. Leitch and C. M. Bruce, Loan Commissioners of the Territory of Arizona," and the prayer was for a writ of mandamus requiring the defendants, "acting as the Loan Commissioners of the Territory," to issue the refunding bonds

The question when a suit against an individual in his official capacity abates by his retirement from office has been discussed in a number of cases in this court, and a distinction taken between applications for a mandamus against the head of a department or bureau for a personal delinquency, and those against a continuing municipal board with a continuing duty, and the delinquency is that of the board in its corporate capacity. The earliest case is that of *The Secretary* v. *McGarrahan*, (9 Wall. 298,) which was a writ of mandamus against Mr. Browning, then Secretary of the Interior, in which it appeared that Mr. Browning had

resigned some months before the decision of the court was announced. It was held that the suit abated by his resignation, because he no longer possessed the power to execute the commands of the writ, and that his successor could not be adjudged in default, as the judgment was rendered against him without notice or opportunity to be heard. The same question was more fully considered in *United States* v. *Boutwell,* (17 Wall. 604,) in which it was held that a mandamus against the Secretary of the Treasury abated on his death or retirement from office, and that his successor could not be brought in by way of amendment or order of substitution. Said Mr. Justice Strong: "But no matter out of what facts or relations the duty has grown, what the law regards and what it seeks to enforce by a writ of mandamus is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant had neglected or refused to perform a personal duty, to the performance of which, by him, the relator has a clear right. . . . It necessarily follows from this that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And if a successor in office be substituted, he may be mulcted in costs for the default of his predecessor, without any delinquency of his own." This language has evidently but an imperfect application to a case where the delinquency is not personal but official, and the action is not that of an individual but of a body of men in their collective capacity.

These were followed by *Warner Valley Stock Co.* v. *Smith,* (165 U. S. 28,) wherein a bill in equity against the Secretary of the Interior and the Commissioner of the General Land Office, by their personal names, to restrain them from exercising jurisdiction with respect to the disposition of certain public lands, and to compel the Secretary to issue patents therefor to the plaintiff was held to abate, as to the Secretary, upon his resignation from office, and could not afterwards be maintained against the Commissioner alone.

In *United States ex rel. Bernardin* v. *Butterworth,* (169 U. S. 600,) it was held that a suit to compel the Commissioner of Patents to issue a patent abates by the death of the Commissioner, and cannot be revived so as to bring in his successor, although the latter gives his consent. See also *United States* v. *Chandler,* (122 U. S. 643;) *United States* v. *Lamont,* (155 U. S. 303;) *United States* v. *Lochren,* (164 U. S. 701.)

It was doubtless to meet the difficulties occasioned by these decisions that Congress, on February 8, 1899, passed an act (30 Stat. 822) to prevent the abatement of such actions.

We have held, however, in a number of cases, that if the action be brought against a continuing municipal board it does not abate by a change of personnel. Thus, in *Commissioners* v. *Sellew*, (99 U. S. 624,) which was an application for a mandamus against a board of county commissioners and its individual members to compel them to levy a tax to pay a judgment, it was held that the action would lie, though the terms of the members had expired, and the case of Boutwell was distinguished upon the ground that the county commissioners were "a corporation created and organized for the express purpose of performing the duty, among others, which the relator seeks to have enforced. The alternative writ was directed both to the board in its corporate capacity and to the individual members by name, but the peremptory writ was ordered against the corporation alone." Said the Chief Justice: "One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifests itself in Boutwell's case may be avoided. In this way the office can be reached and the officer compelled to perform its duties, no matter what changes are made in the agents by whom the officer acts. The board is in effect the officer, and the members of the board are but the agents to perform such duties. While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failing to do what the law requires of them as the representatives of the corporation."

This was followed by *Thompson* v. *United States*, (103 U. S. 480,) which was a petition for a mandamus to compel the clerk of a township to certify a judgment obtained by the relator against the township, to the supervisor, in order that the amount thereof might be placed upon the tax roll. It was held that the proceeding did not abate by the resignation of the clerk upon the appointment of his successor; citing *People* v. *Champion*, (16 John. 60,) and *People* v. *Collins*, (19 Wend. 56.) See also *In re Hollon Parker*, (131 U. S. 221.)

We think these cases control the one under consideration and that they are clearly distinguishable from the others. The Loan Commission of Arizona was originally created by an act of the Territorial legislature of 1887, (Laws of 1887, chap. 31,) the first section of which reads as follows:

"2039 (Sec. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona, the governor of the said Territory, together with the Territorial auditor and Territorial secretary, and their successors in office, shall constitute a board of commissioners, to be styled the Loan Commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided."

Congress, by an act approved June 5, 1890, re-enacted this statute substantially verbatim. (26 Stat. 175.) As the members of this commission and their successors in office were constituted a Loan Commission for the express purpose of liquidating and providing for the payment of the outstanding indebtedness of the Territory, and subsequently by the act of Congress of 1896, (29 Stat. 262,) of its counties, municipalities and school districts, we think it must be treated as a continuing body, without regard to its individual membership, and that the individuals constituting the board at the time the peremptory writ was issued may be compelled to obey it. As we said in *Thompson's case*, (103 U. S. 480,) "the proceedings may be commenced with one set of officers and terminate with another, the latter being bound by the judgment."

It is true the Loan Commissioners were not made a corporation by the act constituting the board, but they were vested with power, and were required to perform a public duty; and, in case of refusal, the performance of such duty may be enforced by mandamus, under section 2335 of the Revised Statutes of Arizona of 1887, which provides that "the writ of mandamus may be issued by the Supreme or District Court to any inferior tribunal, corporation, *board* or person, to compel the performance of an act which the law especially enjoins." As, under the act of Congress, as well as the Territorial act, the board was made a continuing body with corporate succession, the fact that it is not made a corporation by name is immaterial.

2. Respondents, however, relied largely upon the fact that as the Loan Commission of Arizona was abolished prior to the judgment of the Supreme Court in this case, there are now no persons upon whom the duty rests to fund the bonds in question, or against whom the writ of mandamus can go. There is no doubt that the legislature of Arizona did on March 13, 1899, pass an act "to abolish the Loan Commission," hereinafter set forth in full. But, in order to determine the effect of such act, it will be necessary to give a synopsis of the prior acts, both Territorial and Congressional, upon the same subject.

To meet certain objections that had been raised to the validity of bonds issued in aid of railroads, (which objections were subsequently sustained by this court in *Lewis* v. *Pima County*, 155 U. S. 54,) the legislature of Arizona on March 18, 1887, passed an act consisting of fourteen sections, the first section of which (above cited) constituted the governor, auditor and secretary of the Territory Loan Commissioners of the Territory, for the purpose of providing for the payment of the existing territorial indebtedness of the Territory due, and to become due, and for the purpose of paying and refunding the existing or subsisting *Territorial legal* indebtedness, with power to issue negotiable bonds therefor. This power was limited to the *legal* indebtedness of the *Territory* and apparently had no

bearing upon the indebtedness of its municipalities—certainly not upon indebtedness which had been illegally contracted.

On June 25, 1890, Congress passed an act, (26 Stat. 175,) providing that the above-mentioned funding act of the Territory of Arizona "be, and is hereby, amended so as to read as follows, and that as amended the same is hereby approved and confirmed, *subject to future Territorial legislation*." The first section of this act is an exact copy of the first section of the Territorial act of 1887, with an immaterial addition here printed in italics, and reads as follows: "Par. 2039 (Sec. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona *and such future indebtedness as may be or is now authorized by law*, the governor of the said Territory, together with the Territorial auditor and Territorial secretary, and their successors in office, shall constitute a board of commissioners, to be styled the Loan Commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided." Then follow thirteen other sections, which are also copies of the corresponding sections of the Territorial act, with a few immaterial changes as to the rate of interest, the form of the refunding orders, and the maturity of the bonds, &c., and followed by an additional section, (15,) providing against any further increase of indebtedness with certain exceptions, beyond that limited by a former act.

The first question to be considered is as to the relation of these two acts. Is the act of Congress to be considered as an amendment or a repeal of the Territorial act? It is true the preamble speaks of the Territorial act as being amended, and, as amended, approved and confirmed. But the language is not that of an amending act, but that of a repeated and substituted act. No attention is called to the amendments, which are not even introduced in brackets, and a careful reading and comparison of the two acts are required to discover where and how the Territorial act is amended. It stands as an original piece of legislation, although its different sections contain the numbers taken from the Revised Statutes of Arizona, as well as from the original act of 1887. Both acts are complete in themselves, and each is, upon its face, independent of the other. It is impossible to say that, if the Territorial act were repealed, the act of Congress passed three years later would also fail in consequence thereof, because the latter is not only the later, but the paramount act. They must either stand together as two independent pieces of legislation or the general, and perhaps the sounder, rule stated in *United States* v. *Tynen*, (11 Wall. 88,) be applied, that where there are two acts on the same subject, and the latter act embraces all the provisions of the first, and also new provisions, and imposes different or additional penalties, the latter act operates, without any repealing clause, as a repeal of the first. In that

case, the defendant was indicted under an act passed in 1813 for uttering and counterfeiting a certificate of citizenship, purporting to have been issued by a California court. Upon a demurrer being filed to the indictment, the judges differed in opinion, and the case was sent to this court upon a certificate of division. While pending here, in 1870, Congress passed another act, embracing the whole subject of fraud against the naturalization laws, including all the acts mentioned in the law of 1813, and many others. It was held that the act of 1870 operated as a repeal of the act of 1813, and that all criminal proceedings taken under the former act failed; and that even where two acts are not, in express terms, repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions plainly showing that it was intended to be a substitute for the first act, it will operate as a repeal of that act—citing a number of prior cases.

We think that case is controlling of the one under consideration, notwithstanding the cases of *Miners' Bank* v. *Iowa*, (12 How. 107,) and *Lyons* v. *Woods*, (153 U. S. 661,) relied upon by the respondents, which are readily distinguishable. In the first case, the Territorial legislature of Wisconsin chartered the Miners' Bank. Afterwards, an act of Congress annulled the charter in certain particulars, but left other provisions in force. Thereafter, the Territory was divided by an act of Congress, and the Territory of Iowa erected over that former part of the Territory of Wisconsin in which the bank was located. Later, the Territorial legislature of Iowa repealed the charter, and directed the settlement of the affairs of the corporation by trustees under the supervision of the court. It was held that the annulment of several of the provisions of the bank's charter did not make the charter of the bank a Congressional charter, but that it still remained a creation of the legislature of Wisconsin, and that no Federal question arose from the repeal of that charter by the legislature of Iowa. The case is totally different from the one under consideration, and that of *Lyons* v. *Woods* is equally so. There is a plain distinction between an act of Congress amending a Territorial act by adding or striking out particular provisions, and one re-enacting it substantially in all its provisions.

We, therefore, are constrained to hold, as did the Supreme Court of the Territory, that the Territorial act of 1887 was repealed by the act of Congress of 1890, and that the latter act is still in force.

Returning now to the subsequent legislation, it appears that on March 19, 1891, the Territory passed an act "supplemental to the act of Congress" approved June 25, 1890, and in compliance with the permit given by Congress for future Territorial legislation, the first section of which declared that the act of Congress "be, and the same is hereby, now re-enacted as of the date of its approval," and enacted that the Loan Com-

missioners "shall provide" for the funding of the outstanding indebtedness "of the Territory, the counties, municipalities and school districts within said Territory, by the issuance of bonds of said Territory as authorized by said act;" and also provided (sec. 7) that "any person holding bonds, warrants, or any other evidence of indebtedness of the Territory, or any county, municipality or school district within the Territory, . . . may exchange the same for the bonds issued under the provisions of this act."

In the following year, and on July 13, 1892, Congress passed another act amending the act of June 25, 1890, in several immaterial particulars, not necessary to be further noticed, and on August 3, 1894, it passed another act amending the act of 1890, also in immaterial particulars.

It seems, however, as stated in *Utter* v. *Franklin*, (172 U. S. 416, 420,) that the existing legislation upon the subject was not deemed adequate by the Territorial legislature, since in 1895 it adopted a memorial, urging Congress to pass such curative legislation as would protect the holders of all bonds issued under authority of its acts, the validity of which had been acknowledged, and relieve the people from the disastrous effects of repudiation.

In compliance with this memorial, Congress on June 6, 1896, (19 Stat. 262,) passed an act extending the provisions of the act of June 25, 1890, and the amendatory act of 1891, the first section of which provided that the above acts "are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities, and school districts thereof, as provided in the act of Congress approved June 25, 1890," &c.; provided that such evidences of indebtedness "have been sold or exchanged in good faith in compliance with the terms of the act of the legislature by which they were authorized," and also providing that they "*shall be funded* with the interest thereon," &c. The second section provided that all bonds and other evidences of indebtedness heretofore funded by the Loan Commission of Arizona under the act of 1890, "are hereby declared to be valid and legal for the purposes for which they were funded, and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory, as hereinbefore authorized to be funded, are hereby confirmed, approved and validated, and may be funded as in this act provided, until January 1, 1897."

This act was held in *Utter* v. *Franklin* to require the refunding of the bonds involved in the case under consideration. There is no suggestion of any attempt having been made to repeal it. This opinion was pronounced January 3, 1899, and on March 13 of the same year the legislature passed a Territorial act abolishing the Loan Commission. This act is in the following language:

"An Act to abolish the Loan Commission and to repeal sundry laws relating thereto.

"*Be it enacted by the Legislative Assembly of the Territory of Arizona.* SECT. 1. That par. 2039, Sect. 1, Chapter one, Title 31, of the Revised Statutes of the Territory of Arizona; also that Sect. 1 of Act No. 79, Session Laws of the 16th Legislative Assembly of the Territory of Arizona, also Act No. 33, and Act No. 74, Session Laws of the 18th Legislative Assembly of the Territory, are hereby repealed."

It will be observed that paragraph 2039, thus repealed, is the first section of the Territorial act of 1887, whereby the Territorial governor, auditor and secretary were constituted Loan Commissioners; that section 1 of Act No. 79 was the Territorial act of March 18, 1891, re-enacting the act of Congress of June 25, 1890, which, as before stated, was a substituted copy of the Territorial act of 1887. Act No. 33 and Act No. 74 have no bearing upon this case. The former referred only to Territorial indebtedness, and the latter merely remedied defects in the records of the Loan Commissioners.

Upon this repealing act being presented to Governor Murphy, one of the defendants, for his approval, he submitted it to the Attorney General for his opinion, and was advised by him that the act was void so far as attempting to abolish the Loan Commission was concerned. He advised the governor that, so far as the bill attempted to repeal section 1 of the Territorial act of 1887, it was nugatory, as there was no such section to repeal, Congress having re-enacted it and having repealed all acts or parts of acts in conflict with it, and that if it were the intention of the repealing act to repeal the act of 1887 as approved and confirmed by Congress, it was beyond the province of the Territorial legislature to do so. Upon this opinion the governor returned the act without his approval, but the legislature proceeded to pass it over his veto by a two-thirds vote.

Had the Territorial statute of 1887 been the sole authority for the appointment of Loan Commissioners, there would be much force in the argument that the repeal of this statute as well as that of 1891, in 1899, terminated their official existence and operated even on pending cases, (*Insurance Co.* v. *Ritchie*, 5 Wall. 541; *Ex parte McCardle*, 7 Wall. 506; *In re Hall*, 167 U. S. 38;) but, as we have already indicated, we think the Congressional act of 1890 had already operated as a repeal of that act. Unless we are to take the position that the repeal of a Territorial act operates as a repeal of an act of Congress covering the same subject, it is impossible to deny that the Congressional act of 1890 is still in force. Had the latter been a mere amendment of the Territorial act, the result would have been different, and a repeal of the original operated as a repeal of the Congressional amendment.

It is true that the preamble of the act of 1890 declares that the funding Territorial act of 1887 "is hereby amended," and "as amended the same

is hereby approved and confirmed, *subject to future Territorial legislation*," and it is insisted that, under this power to amend, it was competent for the Territorial legislature to repeal the act altogether, and that such repeal would operate also to repeal the Congressional act of 1890. That, as the legislature, before the approval by Congress of the act of 1887, had the undoubted power to abolish the commission which it had created, and as the act of 1887 was declared by Congress to be "subject to future Territorial legislation," it had the power to do after the act of 1890 whatever it might have done before. But we think this is giving to the words "subject to future Territorial legislation" too broad a scope. It was doubtless intended by these words to give to the Territorial legislature power to make such new regulations concerning the funding act as future exigencies might seem to require. This power was properly exercised in the Territorial act of March 19, 1891. Congress itself exercised the same power of amendment by its acts of July 13, 1892, August 3, 1894, and June 6, 1896. While we held in the recent case of *Shuerman* v. *Arizona, ante* p. —, that the Territorial statute of 1887 was the foundation for the appointment of the loan commissioners, and that their authority must be exercised in the manner prescribed by the Territorial laws, it by no means follows that it was within the contemplation of Congress to authorize the legislature to repeal the act of 1890 under which their existence was continued. It was entirely reasonable to assume that the Territorial legislature might wish to extend the power of refunding the bonds to those issued by its own municipalities, as well as by itself, as it did by the act of March 19, 1891, but it is inconceivable that, after having passed a complete and independent act of its own for the refunding of Territorial bonds, Congress should authorize a Territorial legislature to repeal it. While the Territorial and Congressional legislation, subsequent to the act of Congress of June 25, 1890, has but little bearing upon the question now in controversy in this case, it indicates plainly that, under the power given for future Territorial legislation, it was contemplated that such legislation should be in furtherance and extension of the main object of the act of 1890, whereby the power of refunding Territorial indebtedness should be extended to the indebtedness of counties, municipalities and school districts of the Territory, and that it could not have been contemplated that power should be given to the Territorial legislature to abolish the whole system without the consent of Congress.

The result is that, even if we are mistaken in saying that the Congressional act of 1890 operated as a repeal of the Territorial act of 1887, it is still a separate and independent act which it was beyond the Territorial legislature to repeal, and that the office of Loan Commissioners, continued by the act, was not terminated by the repeal of 1899.

But in addition to this, there is a saving clause in the Revised Statutes of Arizona of 1887, which provides as follows:

"2934, (SEC. 7). The repeal or abrogation of any statute law or rule does not revive any former statute, law or rule theretofore repealed or abrogated, nor does it affect any right then already existing or accrued at the time of such repeal, or any action or proceeding theretofore taken, except such as may be provided in such subsequent repealing statute, nor shall it affect any private statute not expressly repealed thereby."

It may admit of some doubt whether the petitioners had obtained any such "right" at the time of the repealing act of 1889, as could be said to be then "existing or accrued," and thereby saved by this section, inasmuch as they had obtained no judgment upon the refunding bonds before applying for a writ of mandamus, as was the case in *Memphis* v. *United States*, (97 U. S. 293,) although, it is true, they had obtained the opinion of this court that such bonds should issue.

But without expressing an opinion upon this point, we think that the petition for this mandamus was a "proceediug theretofore taken" within the meaning of the saving clause of section 2934, and that the right of the petitioners was saved thereby, even if it be conceded that the Loan Commission had been abolished. In the case of *Memphis* v. *United States*, already alluded to, it was said that "when the alternative writ of mandamus was issued March 22, 1875, a proceeding was commenced under or by virtue of the statute." The defendants insist that the action or proceeding must have resulted in a judgment prior to the repealing statute, in order that the rights should be saved by section 2934. This, however, confounds the distinction between a "right" already "existing or accrued" and an "action or proceeding theretofore taken," since, if the proceeding had culminated in a judgment, the latter clause would be superfluous, and the judgment would be saved by the former clause with respect to a right already existing or accrued. Every word or clause used in a statute is presumed to have a meaning of its own, independent of other clauses, and if a statute preserve not only rights but proceedings it will be presumed that the legislature intended to save both classes, and to give to "proceeding taken" a broader meaning than would be indicated by the words "right existing or accrued."

3. The only remaining questions urged against the issue of a mandamus in this case is that these bonds do not come within the provisions of the act of June 6, 1896, for the reason that the Arizona legislature, finding that an attempt was being made to include the bonds in question in that act, adopted certain memorials in 1897 and 1899 urging the President to veto the act of Congress legalizing the bonds, and urging upon Congress to pass such legislation as would exclude from the provisions of the act of June 6, 1896, the bonds issued by Pima County to the Arizona Narrow Gauge Railroad Company, so that the act should not be so construed as to validate these bonds. These memorials, however, seem to have been unsuccessful. No interest, however, was paid upon the bonds, and it was

shown by the findings of fact that the present owners, Coler & Company, bought them as they matured with notice that the first coupons had been protested, and that the bonds had been repudiated by Pima County from the start. The court below, however, made a finding of fact from which it appeared that the original bonds of Pima County were issued in literal compliance with an act of the Territory of Arizona, approved February 21, 1883, in exchange for bonds of the Narrow Gauge Railroad Company. It is true that the county of Pima derived little or no benefit from the building of the few miles of railroad, but, as was said by the Supreme Court, "there was nothing in evidence showing bad faith on the part of the railroad company, in so far as the first exchange of bonds was concerned, nor is there any evidence which shows bad faith on the part of the company or its contractor, Walker and his principals, Coler & Company, except their failure to continue the building and equipment of the road after the completion of the thirty miles of grading and laying of ten miles of track, except such inferences as may be drawn from the fact that both the railroad company and Coler & Company had difficulty in raising the money for the payment of the work done, and did not have the resources to go on and complete the work. Can the court say that, notwithstanding the fact that the bonds were exchanged in compliance with the terms of the act of February 21, 1883, they are invalid and not within the provisions of the act of Congress of June 6, 1896, because subsequent to their issue the original holders of those bonds failed to complete the railroad, and the county of Pima thereby received no benefit from the same. The question of a failure of consideration is to be distinguished from that of an exchange of bonds in good faith under the act of June 6, 1896, unless the failure of consideration was due to a failure on the part of the holders of the bonds to comply with the provisions of the act authorizing their issuance. The legislative act was exceedingly liberal in its terms, and contained no safeguard against the failure of the railroad company to build or operate the road. The only provision looking to the protection of the county was the one which required a certificate of the county surveyor, showing that each five miles of the road was graded and laid with ties and iron, as a condition precedent to the exchange of each fifty thousand dollars of county bonds for a like amount of railroad bonds. As the Supreme Court has held in this case, Congress, by the act of June 6, 1896, has validated the Territorial act of February 21, 1883. And as the latter did not make the completion of the road a condition precedent to the issuance of the bonds, nor make their validity dependent upon the subsequent conduct of the railroad company, bad faith cannot be predicated of the transaction so long as there was not only a substantial, but a literal, compliance, as well, with the requirements of the act under which they were issued."

But a further answer to these objections to the validity of the bonds is that all the facts upon which these objections are founded existed and were known to the Loan Commissioners at the time the original answer was filed and before the case of *Utter* v. *Franklin* was heard or decided by this court, and should have been then set up as a defense upon the merits.

Upon the whole case we are of opinion that the judgment of the Supreme Court of Arizona, ordering a peremptory mandamus to issue to the present Loan Commissioners, was right, and it is therefore

Affirmed.

Mr. Justice GRAY did not sit in this case and took no part in its decision.

True copy.

Test:

Clerk Supreme Court, U. S.